101st Congress
2d Session

SENATE

Exec. Rept.
101-32

NOMINATION OF DAVID H. SOUTER TO BE AN ASSOCIATE JUSTICE OF THE UNITED STATES SUPREME COURT

October 1, 1990.—Ordered to be printed

Mr. Biden, from the Committee on the Judiciary,
submitted the following

REPORT

together with

ADDITIONAL AND MINORITY VIEWS

[To accompany the nomination of David H. Souter to be an Associate Justice of the United States Supreme Court]

The Committee on the Judiciary, to which was referred the nomination of Judge David H. Souter to be an Associate Justice of the United States Supreme Court, having considering the same, reports favorably thereon, a quorum being present, by a vote of 13 yeas and 1 nay, with the recommendation that the nomination be approved.

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I. Introduction

On July 20, 1990, William Brennan resigned from the United States Supreme Court after 34 years of service as an Associate Jus-

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tice. Five days later, on July 25, the Senate Judiciary Committee received President Bush's nomination of Judge David H. Souter to fill the seat vacated by Justice Brennan.

The Senate Judiciary Committee held five days of hearings on Judge Souter's nomination—the third longest set of hearings on any Supreme Court nomination in history. The nominee testified during the course of three days, the second longest appearance by a Supreme Court nominee ever.

On September 27, 1990, a quorum being present, the committee voted, 13 to 1, to report the nomination with a favorable recommendation.

AYES	NAYS
Mr. Biden	Mr. Kennedy
Mr. Metzenbaum	
Mr. DeConcini	
Mr. Leahy	
Mr. Heflin	
Mr. Simon	
Mr. Kohl	
Mr. Thurmond	
Mr. Hatch	
Mr. Simpson	
Mr. Grassley	
Mr. Specter	
Mr. Humphrey	

II. Background

The committee received the President's nomination of Judge David H. Souter to be an Associate Justice of the United States Supreme Court on July 25, 1990. The hearings on Judge Souter's nomination were held on September 13, 14, 17, 18 and 19; these were the third longest hearings on a Supreme Court nomination in history. The nominee was questioned for nearly 20 hours on three days, the second longest appearance by a Supreme Court nominee ever.

The committee heard testimony from a total of 39 witnesses, including: Kate Michelman, Executive Director, National Abortion Rights Action League; Faye Wattleton, President, Planned Parenthood Federation of America; former Attorney General Griffin Bell; Senator Slade Gorton; former Governor and Attorney General of the State of Virginia, Gerald Baliles; former Vermont Attorney General Jerome Diamond; Antonia Hernadez, President and General Counsel, Mexican American Legal Defense and Education Fund; Joseph L. Rauh, Jr., General Counsel, Leadership Conference on Civil Rights; Joan Bronk, President, National Council of Jewish Women; John T. Broderick, Jr., President, New Hampshire Bar Association; Steven J. McAuliffe, President-elect, New Hampshire Bar Association; Deborah Cooper, former Deputy Attorney General, State of New Hampshire; Representative Chuck Douglas, Eleanor Smeal, President, The Fund for the Feminist Majority; Molly Yard, President, National Organization for Women, Inc.; Gloria Allred, a Los Angeles, California attorney, accompanied by Norma McCorvey; Helen Neuborne, Executive Director, NOW Legal Defense and

Education Fund; former Congresswoman Elizabeth Holtzman; R. Eden Martin, Sidley & Austin; William L. Dunfey, the Dunfey Group; Robert J. Ruiz, President, the National Hispanic Bar Association; Sophia H. Hall, President, National Association of Women Judges; Doris Coleman, President, California Women Lawyers; Wesley S. Williams, Jr., Covington & Burling; Robert L. Beck, Immediate Past Chairman of the Board, Mothers Against Drunk Driving; Robert L. Barr, Jr., President, Southeastern Legal Foundation, Inc.; Haywood Burns, Immediate Past President, the National Lawyers Guild; Christopher F. D. Ryder, Member, Advisory Board, Supreme Court Watch; Paula L. Ettelbrick, Legal Director, Lambda Legal Defense Fund: Urvashi Vaid, Executive Director, National Gay and Lesbian Task Force; Sara E. Rios, Staff Attorney, Center for Constitutional Rights; John J. Bellizzi, Executive Director, International Narcotics Enforcement Officers Association; Edmund Mosca, Member, Executive Committee, International Association of Chiefs of Police; Sheriff Bob E. Rice, President, National Sheriffs Association; Johnny L. Hughes, Director of Legislative and Congressional Affairs, National Troopers Coalition; Dewey R. Stokes, National President, Fraternal Order of Police; and Howard Phillips, Chairman, The Conservative Caucus, Inc.

The committee carefully and thoroughly scrutinized the nominee's qualifications and credentials, including his seven-year record as a Judge on the New Hampshire Supreme Court; his five-year record as a Judge on the New Hampshire Superior Court; and his 10-year record as Attorney General, Deputy Attorney General and Assistant Attorney General of the State of New Hampshire.

III. THE NOMINEE

Judge Souter was born on September 17, 1939, in Melrose, Massachusetts. He received his Bachelor of Arts degree from Harvard College in 1961. Judge Souter was a Rhodes Scholar, and attended Magdalen College, Oxford, between 1961 and 1963. He received his legal education at Harvard Law School, which he attended from 1963 to 1966.

From 1966 to 1968, the nominee engaged in the private practice of law with the Concord, New Hampshire law firm of Orr and Reno.

The nominee served for 10 years in the office of Attorney General for the State of New Hampshire. From 1968 to 1971, he was an Assistant Attorney General. From 1971 to 1976, the nominee was Deputy Attorney General. And from 1976 to 1978, he was Attorney General.

From 1978 to 1983, the nominee served as Associate Justice of the Superior Court of New Hampshire.

From 1983 to 1990, the nominee served as Associate Justice of the Supreme Court of New Hampshire.

In 1990, President Bush appointed Judge Souter to the U.S. Court of Appeals for the First Circuit, a position he held for five months before his nomination to the Supreme Court.

IV. THE AMERICAN BAR ASSOCIATION'S EVALUATION

A. THE STANDING COMMITTEE'S ASSESSMENT

The American Bar Association's Standing Committee on the Federal Judiciary, chaired by Ralph I. Lancaster, unanimously found Judge Souter to be "Well Qualified," its highest rating. (Letter from Ralph I. Lancaster to Chairman Biden, September 14, 1990, at 1.)

In reaching this conclusion, the Standing Committee evaluated Judge Souter's "professional competence, integrity, and judicial temperament," The Committee concluded that "Judge Souter's integrity, character and general reputation appear to be of the highest order and without blemish;" that his "judicial temperament appears to meet the high standards of this Committee's definition;" and that his "professional competence appears to meet the high standards of the Committee." (Id. at 3.)

The Standing Committee pointed out that "[c]oncerns that Judge Souter is 'too deferential to the Legislature' or 'biased in favor of government action' were thoroughly investigated." (Id.) The Standing Committee reported:

> Each of these concerns was discussed with Judge Souter and examined in detail by the Committee in light of all the other information we had gathered. We concluded that Judge Souter's opinions are shaped by his conception of the role of an appellate judge and not by any lack of evenhandedness. (Id.)

B. THE STANDING COMMITTEE'S INVESTIGATION

The Standing Committee's investigation began on July 24, 1990 and ended on September 4, 1990. Committee members contacted judges, attorneys and law professors throughout the United States.

Judge Souter's more than 200 New Hampshire Supreme Court opinions were reviewed by three reading committees, chaired by Rex E. Lee, former Solicitor General of the United States and President of Brigham Young University, Professor Ronald Allen, Northwestern School of Law, and Dean Paul Brest, Stanford Law School, respectively. The Standing Committee reported:

> The results of the reviews by those three Reading Committees were independently analyzed and evaluated by each member of the Committee. In addition, each member of the Committee independently read and analyzed selected New Hampshire Supreme Court opinions authored by Judge Souter. All of Judge Souter's opinions as Attorney General and many of his Superior Court opinions were also reviewed, analyzed and evaluated. (Id. at 2.)

The Standing Committee concluded:

> Based on its own independent evaluation of the opinions authored by Judge Souter and the responses of the Reading Committees, and based upon the results of the rest of its investigation, including extensive interviews with Judge Souter, this Committee is satisfied that whether one agrees or disagrees with the court's holdings, the opinions

> are carefully crafted, analytically sound and clearly professionally competnent. (Id. at 4.)

Three members of the Standing Committee personally interviewed Judge Souter.

V. COMMITTEE RECOMMENDATION

A majority of the committee has voted to favorably report to the Senate the nomination of Judge David Hackett Souter to be an Associate Justice of the United States Supreme Court. Consequently, we hereby recommend that the Senate, pursuant to Article II of the Constitution, offer its consent to the President's nomination.

ADDITIONAL VIEWS OF CHAIRMAN BIDEN

INTRODUCTION

As the hearings on Judge Souter's nomination began, I believed the Judiciary Committee had the need—the duty—to learn as much about the nominee's views as possible. No nominee in a quarter-century had come to this committee with less known about his constitutional philosophy than David Souter. And no nomination—at any time since the 1930s—had come before the Senate at a moment of such importance, in terms of setting the future direction of the Supreme Court.

As this critical moment, this committee had an obligation to learn all that could about Judge Souter's constitutional philosophy. And at this critical moment, I believe that the burden of proof rested on the nominee to demonstrate that he is the person whom the Senate should confirm to sit on the nation's highest court.

In my view, Judge Souter met his burden of proof with respect to some matters, and failed to do so with respect to others. His philosophy was neither proven to be wholly inappropriate, or wholly acceptable, for confirmation.

In several areas, there were reassuring signs. For example, in the area of freedom of speech, Judge Souter indicated his support for Justice Brennan's landmark precedent of *New York Times Co.* v. *Sullivan,* 376 U.S. 254 (1964); for the Supreme Court's ban on the prior restraint of the press; and for the decision in *Brandenburg* v. *Ohio,* 395 U.S. 444 (1969), that permits speech that urges civil disobedience.

In the field of Free Exercise of religion, Judge Souter indicated that he had "no reason to raise questions about the appropriateness of the strict scrutiny test" (Transcript, Sept. 14, at 46) for laws that impair religious practices. Thus, Judge Souter suggested that he disagreed with the Supreme Court's recent and restrictive decision in ***Employment Division of Oregon*** v. ***Smith,*** 110 S. Ct. 1595 (1990), that undermines religious freedom in our country. This, again, is a very encouraging point of view.

In the area of stare decisis, Judge Souter detailed a philosophy that shows a proper respect for precedent. And quite hearteningly, Judge Souter particularly emphasized that—before the Supreme Court reverses a prior ruling—it should take into account "whether private citizens * * * have relied upon the precedent] in their own planning to such a degree that * * * it would be a great hardship in overruling it now." (Transcript, Sept. 13, at 137.) This distinguishes Judge Souter from other nominess, who said that they would look only to whether governmental structures and social institutions have been built up around a particular decision—Judge Souter's view is, quite obviously, more reassuring than this more limited approach.

And, finally, for this side of the ledger—and most importantly—Judge Souter categorically rejected the archconservative judicial philosophy of "original intent:" the view that the meaning of constitutional provisions should be limited to the specific intentions of their framers.

This doctrine—as Judge Souter himself acknowledged—would undermine many of the most important decisions the Supreme Court has given us through the years: *Brown* v. *Board of Education,* 347 U.S. 483 (1954); the one person, one vote rulings; and the Court's rulings that outlaw discrimination against women.

Judge Souter said that this "original intent" doctrine is "not * * * the appropriate criterion of constitutional meaning." (Transcript, Sept. 13, at 214.) And, in response to my question, "does the correct interpretation of a constitutional provision * * * change over time?," Judge Souter said, "principles don't change, but our perceptions of the world around us and the need for those principles do." (Transcript, Sept. 17, at 196–97.)

In all of these critical respects, Judge Souter clearly proved to the committee that his judicial philosophy was sound—and even highly commendable. In all of these critical respects, Judge Souter met his burden of proof—and then some.

As these Additional Views indicate, in four other areas, though, Judge Souter left the committee with a more mixed record.

First, there is the area of establishment of religion. Here, Judge Souter criticized the prevailing Supreme Court rule of *Lemon* v. *Kurtzman,* 403 U.S. 602 (1971)—which is not an exceptional view—but he did so without indicating what guarantees of religious liberty he would impose in its place.

As a result, we were left with a very unclear picture of how Judge Souter approaches this important issue; we have very little idea how "high" he thinks the "wall of separation" between church and state ought to be.

Second, there is the area of race discrimination. Here, too, some things Judge Souter said were quite hopeful: He called the struggle for racial equality the "most tragic" problem confronting the nation, and he suggested that, in his view, at least some types of affirmative action programs are permissible.

Yet aspects of Judge Souter's record as Attorney General of New Hampshire and of his testimony before the committee were troubling. Again, the record is a mixed one.

Third, there is the area of gender discrimination. Judge Souter criticized the Supreme Court's current middle-tier scrutiny for laws that discriminate on the basis of gender, and even implied that the basis for his criticism was that the Court's existing standard fails to provide adequate protection for women's rights.

Yet I found disappointing Judge Souter's failure to indicate clearly whether his standard in this area would, in fact, be more rigorous—or, inappropriately, less rigorous—than current law. The nominee's tone suggested that he was headed in the right direction, but I do not know for sure—and I would feel more comfortable if I did.

Finally, there is the area of privacy and reproductive choice. Here, Judge Souter did say some encouraging things. He agreed that there is a marital right to privacy, and that the right of married couples to make choices about procreation is "at the core" of that fundamental right. (Transcript, Sept 13, at 116.) He agreed that the Constitution protects unenumerated rights, and more specifically, that there is substantive content in the Due Process Clauses of the Fifth and Fourteenth Amendments, and the Ninth Amendment—important guarantees of the liberties of all Americans.

And perhaps most importantly, he flatly rejected the methodology being advanced by Chief Justice Rehnquist and Justice Scalia for determining when, in the future, privacy rights will be recognized by the Court. Judge Souter said that he "could not accept [their] view" (Transcript, Sept. 14, 160)—and I find that very, very encouraging.

At the opposite end of the spectrum in the privacy area, however, I found most troubling Judge Souter's declaration that the issue of whether unmarried persons have any fundamental right of privacy is "an open question." (Transcript, Sept. 17, at 230.) I firmly believe that this is not an "open question:" Individuals do have a right to privacy, that right is fundamental, and the Supreme Court—in 26 opinions, written by 10 different justices over the past 17 years—has recognized this fundamental right.

Between the privacy issues on which Judge Souter met his burden of proof—and the issue on which Judge Souter failed—is one vital privacy issue that Judge Souter declined to speak to altogether: whether a woman's fundamental right not to be pregnant continues after her birth control fails.

As I explained in detail during the hearings, I feel that Judge Souter could have told us far more about his views in this area without compromising his judicial independence, or indicating how he would vote on a request to overrule *Roe* v. *Wade,* 410 U.S. 113 (1973). Judge Souter's refusal to talk at all about his philosophy in this area frustrated the committee's exercise of its constitutional responsibilities, and I find it another, very troubling aspect of this nomination.

In sum, then, we have before us a nominee that satisfied his burden of proof with respect to some issues, straddled the line on others, failed on some, and left us with a question mark on still other matters. This mixed picture makes his nomination a very, very difficult case. But after weighing the evidence closely, and studying the record intensely, I decided to vote to confirm David Souter as Associate Justice of the Supreme Court.

Taking Judge Souter at his word, I believe that he clearly demonstrated himself not to be a doctrinaire legal conservative. He clearly distinguished himelf from a quite broad school of legal conservatism—including some conservative positions now being taken by members of the current Court:

> He rejected Justice Scalia's cramped formula for determining when fundamental, unenumerated rights should be acknowledged;
>
> He rejected two shibboleths of the rigid interpretivists by saying that the Due Process Clause does protect substantive liberties—and that the meaning of constitutional provisions cannot be limited to the "original intent" of their framers;

He rejected the Court's recent majority opinion in the *Smith* case, on religious freedom; and

He rejected the conservative view that courts must stay out of the realm of addressing "profound social problems"—indeed, Judge Souter insisted that the court must intervene in these areas when a "vacuum of responsibility" exists. (Transcript, Sept. 14, at 14.)

This repeated rejection of the precepts of modern arch-conservative legal thought—of rigid interpretivism—proved to me what Judge Souter was not: Namely, he is not the sort of man who, if confirmed, would run roughshod over the important precedents handed down by the Supreme Court over the past three decades.

But that alone was not enough. Beyond proving what he is not, Judge Souter also proved to me, affirmatively, that much about his philosophy—about his approach to dealing with the issues of the future—merits my consent to his confirmation.

Weighing most heavily in this respect were Judge Souter's statemetns that he believes that judges must vindicate rights not explicit in the Constitution; that the Due Process Clause protects unenumerated liberties; that a fundamental right to privacy exists; that he would use a broader, and not a narrow, methodology in deciding when the Court should recognize such rights; and the judges must use the Bill of Rights to protect the rights of minorities.

These statements, of course, give me no clear sense of how Judge Souter is going to rule on any one particular case. That is how it should be: I believe that searches should not be made for case-specific commitments from the nominee. But what these statements—and many others—do indicate is that Judge Souter has an approach on most issues that—though far more conservative than I would hope for the Court—is nonetheless an acceptable one.

I believe that this was true for "most issues:" Unfortunately, Judge Souter's refusal to discuss reproductive choice leaves me with no indication at all of where he will come out on this issue—indeed, it leaves me with no indication at all of even how he thinks about this constitutional question.

What Judge Souter did tell the committee, however, was this: "I have not made up my mind and I do not go on the court saying I must go one way or I must go another way." (Transcript, Sept. 14, at 128.) This statement goes a step beyond refusing to tell us his view on reproductive freedom, and tells us—if Judge Souter is to be believed, and I do believe him—that his mind is an open one.

I want to state unequivocally that I am not "undecided" on this underlying question. I strongly believe that a woman's right to choose is fundamental, and protected by our Constitution. And I believe that any attempts to read that right out of the Constitution are misdirected, and reflect a mistaken understanding of the true majesty of the Liberty Clause of the Fourteenth Amendment to our Constitution.

I also know, however, that the President of the United States has the diametrically opposed view. The President has pledged to see *Roe* overruled, and believes it to be wrong. He obviously has no intention of submitting, and will never submit, a nominee who adheres to my view on this matter. I know that—we all know that.

It is one thing to reject a nominee who would come to the Court opposed to reproductive freedom; if the President attempted to send up such a nominee—one who shared the President's view on the choice question—he or she would find a serious fight in the Senate. But if this committee were to go a step further, and also reject a nominee who genuinely seems to be open-minded on this question—neither committed to the President's view or the opposing viewpoint—if we make that a litmus test for confirmation—we will have an eight-member Court for a long time to come.

Under the circumstances of sharp diversion between the White House and the Senate, I believe that the best we can hope for is a judge who has an expansive methodology for interpreting privacy rights generally, and a genuinely—and I emphasize genuinely—open-minded view of a woman's privacy right after conception occurs. Judge Souter is not the sort of judge I would nominate if I were president, but I think that he is about the best we can expect in the divided-government situation we now face.

Of course, this does not mean that I can be confident that Judge Souter will vindicate a woman's right to choose—we do not know where he will be on that question. It does mean, in my view, that he is about the best we are going to do on this score from this Administration.

With this realistic lens as my perspective, I supported Judge Souter's confirmation. I do not do so enthusiastically, and, as the ensuing pages make clear, I do not do so without reservation.

PART ONE: JUDGE SOUTER'S APPROACH TO INTERPRETING THE CONSTITUTION

Judge Souter has stated that he takes an "interpretivist" approach to the Constitution. In his testimony, for example, he said: "I regard myself as within the broad umbrella of interpretivism." (Transcript, Sept. 17, at 124–25.)

The precise meaning of "interpretivism" is very much a matter of controversy. Interpretivism is generally thought of as an approach to the interpretation of the Constitution that emphasizes the importance of the constitutional text. But self-described interpretivists can take sharply varying views on central constitutional issues.[1] Accordingly, a substantial portion of the committee's questioning concerned Judge Souter's so-called interpretivism.

In an important dissenting opinion he wrote while a Justice on the supreme Court of New Hampshire, Judge Souter explained his approach to the interpretation of the New Hampshire constitution in the following terms:

> The court's interpretive task is * * * to determine the meaning of the [constitutional] language as it was understood when the framers proposed it and the people ratified it as part of the original constitutional text that took effect

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[1] Compare, for example, the following, each of which purports to be an interpretivist approach: *Adamson* v. *California,* 332 U.S. 46, 68–123 (1947) (Black, J., dissenting); *New York Times* v. *United States,* 403 U.S. 713, 714–20 (1971) (Black, J., concurring); Bork, "Neutral Principles and Some First Amendment Problems," 47 Ind. L.J. 1, 8 (1971); Ely, "The Wages of Crying Wolf: A Comment on Roe v. Wade," 82 Yale L.J. 920 (1973); Linde, "Judges, Critics, and the Realist Tradition," 82 Yale L.J. 227, 254 (1972).

in June of 1784. ("In re Estate of Dionne," 518 A.2d 178, 181 (1986).)

At first glance, it appears that this approach calls for a rigid interpretation of the Constitution, under which the Constitution protects only those individual rights that the Framers of its provisions specifically sought to protect. Under that approach, several of the landmark decisions of the last half-century might well be incorrect.

For example, in *Brown* v. *Board of Education,* 347 U.S. 483 (1954), the Supreme Court ruled that racial segregation in public schools is unlawful. But there is evidence that the people who drafted and adopted the equal Protection Clause of the Fourteenth Amendment never intended to outlaw segregation.

Similarly, there is no question that those who drafted and adopted the Fourteenth Amendment did not intend to invalidate discrimination against women, which was endemic at the time the amendment was adopted. But in a series of decisions beginning in 1971, the Supreme Court has held that the Equal Protection Clause requires close scrutiny of gender-based classifications. (See, e.q., *Reed* v. *Reed,* 404 U.S. 71 (1971); *Craig* v. *Boren,* 429 U.S. 190 (1976).)

When asked about these and other cases, Judge Souter asserted that his approach was consistent with these decisions. He explained that his concern was with the "meaning" of the constitutional provision or the "principle" that the framers of the provision had adopted, rather than the "specific intent" or specific "applications" that the Framers had in mind.

For example, Judge Souter stated:

> My approach to interpretation is not a specific intent approach. The approach has got to take into consideration the text of the provisions in question and * * * the meaning of that text is not to be confined by reference simply to the specific applications that may have been, as it were, in the mind either individually or institutionally of the people who proposed the amendment * * *. [W]hen we look for the original meaning, we are looking for meaning and for principle. We are not confining outselves simply to immediately intended application. (Transcript, Sept. 17, at 31.)

In response to my question, Judge Souter distinguished his approach from that which he described as "original intent, or the intentionalist school," and he explicitly repudiated the latter:

> [W]hen I speak of original intent, or the intentionalist school, I am talking particularly about that view that the meaning of the provision or the application of the provision should somehow be confined to those specific instances or problems which were in the minds of those who adopted and ratified the provision, and that the provision should be applied only to those instances or problems. *I do not accept that view.* (Transcript, Sept. 17, at 197–96 (emphasis added).)

In an exchange with Senator DeConcini, Judge Souter further elaborate on this position:

> Senator **DeConcini**. My concern there is with what I see as a very rigid use of original intent, at least in that *[Dionne]* dissenting opinion * * *.
>
> Judge **Souter**. Senator, I think the first thing that has to be understood about that dessenting opinion is that . . . I referred to the test of original meaning or original understanding of the terms.
>
> I have tended to shy away from the use of the term "original intent" in describing any approach of mine. I have done so, because the phrase "original intent" has frequently been used to mean that the meaning or application of a constitutional provision should be confined only to those specific examples that were intended to be the objects of its application when it was, in fact, adopted.
>
> * * * * *
>
> I do not believe that the appropriate criterion of constitutional meaning is this sense of specific intent, that you may never apply a provision to any subject except the subject specifically intended by the people who adopted it. I suppose the most spectacular example of the significance of this is the case of *Brown* v. *Board of Education* * * *.
>
> If you were to confine the Equal Protection Clause only to those subjects which its framers and adopters intended it to apply to, it could not have been applied to school desegregation * * *.
>
> The reason *Brown* was correctly decided is not because they intended to apply the Equal Protection Clause to school desegregation, but because they did not confine the Equal Protection Clause to those specific or a specifically enumerated list of applications, the Equal Protection Clause is, by its very terms, a clause of general application.
>
> *What we are looking for, then, when we look for its original meaning is the principle that was intended to be applied* * * *. (Transcript, Sept, 13, at 213–15 (emphasis added).)

Understood in this way, Judge Souter's approach to constitutional interpretation does not require the Court to adhere rigidly to the specific views of those who drafted the constitutional provision in issue. Under the approach Judge Souter described, only constitutional "principles"—the princple of equal protection, the principle of due process—remain the same. The law can develop as each generation applies those principles to its contemporary realities. Judge Souter made this point explicit in response to questioning from me:

> The **Chairman**. Now, Judge, under your approach does the correct interpretation of a constitutional provision * * * change over time?
>
> Judge **Souter**. Principles don't change, but our perceptions of the world around us and the need for those principles do * * *. In 1954 [when *Brown* v. *Board of Education* was decided,] they saw something which they did not see [when *Plessy* v. *Ferquson,* 163 U.S. 567, which approved the

> "separate but equal" doctrine, was decided] in 1896. Now I will say, as I have said before that I think *Plessy* was wrongly decided, but I also I also understood that there was a perception which the experience of 58 years had allowed the Court in 1984 to make and they saw an application for a principle which was not seen in 1896 * * * I would like to think, and I do believe, that the principle of equal protection was there and that in the time intervening we have gotten better at seeing what is before our noses.
>
> The CHAIRMAN. What really is, in fact, equal protection.
>
> Judge SOUTER. Yes. (Transcript, Sept. 17, at 196–97.)

Accordingly, Judge Souter stated that, under his approach, the practice of closely scrutinizing gender classifications is sound, even though the Framers of the Equal Protection Clause "would not have had the slightest inkling that that clause was going to be applied to gender discrimination." (Transcript, Sept. 17, at 30.) Judge Souter also said that the Fourteenth Amendment establishes the principle of "one person, one vote," even though there is strong evidence that its drafters and adopters did not intend to establish such a principle. (Transcript, Sept, 17, at 54, 198.) And Judge Souter endorsed the historical expansion of Congress's Commerce Clause power, because the Framers "wrote more generally than they probably intended by way of application at the time that they wrote it, but they wrote what they wrote." (Transcript, Sept. 17, at 30.)

Judge Souter's recognition of the adaptability of the Constitution was shown in other testimony as well. For example, in response to my questions about *Bolling* v. *Sharpe*, 347 U.S. 497 (1954), which held that the federal government may not operate segregated schools in the District of Columbia, Judge Souter specifically endorsed the view that:

> [T]here is a substantive component to the Due Process Clause. (Transcript, Sept. 17, at 200.)

Judge Souter went on to say that *Bolling* itself is better understood as resting on "substantive due process analysis" (Transcript, Sept. 17, at 201), rather than on equal protection principles, and he remarked that other cases, as well, could be more profitably analyzed as resting on substantive rights rather than equal protection principles. (Transcript, Sept. 17, at 201–02.)

In addition, Judge Souter noted that the "courts must accept their own responsibility for making a just society." (Transcript, Sept. 14, at 13.) He added:

> One of the things that is almost a factor or a law of nature, as well as of constitutional growth, is that if there is, in fact, a profound social problem and the Constitution speaks to that, and if the other branches of Government do not deal with it, ultimately, it does and must land before the bench of the judiciary. (Transcript, Sept. 14, at 13–14.)

Judge Souter's testimony on the role that tradition must play in giving content to the Due Process Clause is also consistent with this view, rather than with a narrow interpretivism that looks only to the understandings of constitutional provisions that were held at the time they were adopted. Judge Souter rejected the view embraced by Justice Scalia in *Michael H.* v. *Gerald D.,* 109 S. Ct. 2333, 2344 n.6 (1989), that a liberty interest under the Due Process Clause can be based only on "the most specific level at which a relevant tradition protecting, or denying protection to, the asserted right can be identified." Judge Souter stated: "[W]e cannot, as a matter of definition at the beginning of our inquiry, narrow the acceptable evidence to the most narrow evidence possible . . ." (Transcript, Sept. 14, at 161.)

I am in general agreement with the approach to constitutional interpretation that Judge Souter described in his testimony. Nonetheless, Judge Souter's record on this point gives rise to some reservations, for two reasons.

First, it is not immediately clear that the flexible, adaptable approach that Judge Souter explained in his testimony is the same as the philosophy he stated in his *Dionne* dissent. The *Dionne* approach seems to seek an interpretation that is established at the time the constitutional provision is adopted: In the words of Judge Souter's *Dionne* opinion, "the meaning of the [constitutional] language *as it was understood when the framers proposed it and the people ratified it.*" This is in tension with Judge Souter's statements, in his testimony, that he is concerned only with the principle revealed by "what they [the Framers] wrote" and not with the Framers' specific understanding of that principle.

At one point in a colloquy with me, Judge Souter seemed to recognize the potential inconsistency between his general approach and the view he described in *Dionne*; he suggested that *Dionne* was an unusual case because the New Hampshire constitutional provision was relatively specific. (Transcript, Sept. 17, at 204–05.) I note that Judge Souter might also have distinguished his *Dionne* approach on the ground that it was dictated by New Hampshire precedents that would not necessarily apply to the interpretation of the United States Constitution. (See 518 A.2d at 181.) But Judge Souter did not draw this distinction. Instead, his position was that "the ultimate criterion of meaning for me in the *Dionne* case was exactly what I think the ultimate criterion should have been and was for the Supreme Court of the United States in *Brown,*" (Transcript, Sept. 14, at 62.)

In addition, while Judge Souter seemed to depart from the narrow historicism of *Dionne* when he was discussing the Fourteenth Amendment and the Commerce Clause, he used a different approach in connection with the Establishment Clause. Senator Leahy asked Judge Souter about an argument, currently made by some, that the Establishment Clause was originally intended only to prevent literal establishments of religion and to maintain government neutrality among Christian sects.[2]

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[2] Justice Rehnquist stated a position similar to this in *Wallace* v. *Jaffree,* 472 U.S. 38, 106 (1985) (dissenting opinion), but did not limit the requirement of neutrality to Christian sects: ("It would seem from th[e] evidence that the Establishment Clause of the First Amendment had acquired a well-established meaning: it forbade establishment of a national religion, and forbade preference among religious sects or denominations.").

The approach Judge Souter outlined in his testimony about the Fourteenth Amendment would lead one to think that he would question this interpretation on the ground that the Establishment Clause enacts a broad principle of religious neutrality that cannot be cabined by a showing of specific historical intentions. But Judge Souter did not take that position in response to Senator Leahy's questions. Instead, he suggested that this extraordinarily narrow interpretation, if historically correct, should be considered by the Court, subject only to the claims of stare decisis:

> Senator LEAHY. You said, Judge, that you would listen respectfully to the school of thought that says the Establishment Clause was originally intended to have a very narrow scope, only to prevent the literal establishment of a State religion or to prevent Government from favoring one sect over another. The same school of thought says we should not require Government neutrality on religious matters * * *.
>
> Now, let's assume for a moment that this original intent school of thought is historically correct * * * would this lead you to modify the principle of neutrality that has been accepted by the Supreme Court for decades?
>
> Judge SOUTER. It would lead me to raise the question but it would not give me the answer. * * * I do not regard the issue in this or in any other case as simply being a single issue of exactly what was the original understanding because we are not being asked to adjudicate on a clean slate.
>
> * * * * * * *
>
> Senator LEAHY. Suppose the original meaning of the clause was only to prevent a State religion or Government preference among Christian sects, would you then think it was appropriate for Government to favor Christianity over Judaism or any other religion?
>
> Judge SOUTER. Well, I think any such conclusion as that would make the claim of precedent an extremely crucial one * * *. (Transcript, Sept. 17, at 105–07 (emphasis added).)

I have some concern, therefore, that Judge Souter might not be fully committed to the approach to constitutional interpretation that he described in his testimony, and may instead follow the approach suggested by the *Dionne* concurring opinion. That this latter approach would be unacceptable is sufficiently shown by the fact that it would call into question *Brown,* the gender discrimination decisions, the principle of "one person, one vote," and numerous other important advances in constitutional law.

My second reservation concerns Judge Souther's repeated self-description as an "interpretivist." There appears to be a severe tension between "interpretivism" and the approach to constitutional interpretation that Judge Souter described in his testimony.

The core idea of interpretivism is close attention to the text of the Constitution as a source of restraint on judges. Judge Souter's interpretive approach, to be sure, begins with the Constitution's text. But this alone tells us little, because few, if any, judges and scholars do not begin constitutional interpretation with the text. The approach Judge Souter described in moving beyond the Constitution's text is appealing because it extracts from the text, not specific commands, but broad principles and aspirations—the principles of "equal protection" and "due process," for example. These principles are so broad, however, that it is not clear what is left of the "interpretivist" idea to which Judge Souter professes allegiance.

Moreover, Judge Souter explicitly embraced the idea that the Due Process Claus has a substantive content. And, as I discuss in greater detail in Part Two, Judge Souter unequivocally endorsed the existence of fundamental constitutional rights that are not enumerated in the Constitution.

I find all of this testimony very positive, but wonder how it can be reconciled with Judge Souter's purported adherence to "interpretivism."

In summary, some aspects of Judge Souter's approach to constitutional interpretation remain unclear and appear to be unsettled. Over-all, however, I am pleased that Judge Souter explicity rejected a narrow approach to constitutional interpretation that would confine the meaning of the Constitution's majestic phrases to the specific intentions of those who drafted them; instead, he outlined a coherent judicial philosophy that allows for the orderly growth of the law.

Consequently, I believe that Judge Souter's over-all interpretative philosophy warrants my support for his confirmation.

PART TWO: JUDGE SOUTER'S VIEWS ON PRIVACY REPRODUCTIVE FREEDOM AND UNENUMERATED RIGHTS

Prior to the hearings, Judge Souter's record on privacy, reproductive freedom and unenumerated rights was relatively scant. During the hearings, his testimony on these subjects was mixed. On some matters, such as unenumerated rights generally, the Ninth Amendment, the right to marital privacy, and his overall methodology, Judge Souter's testimony was quite positive and encouraging. On other matters, such as the right of unmarried individuals to use contraception, Judge Souter's testimony was worrisome. On still other matters, such as reproductive freedom, his reticence was troubling.

A. JUDGE SOUTER UNEQUIVOCALLY EMBRACED A GENERAL UNENUMERATED RIGHT TO PRIVACY

1. Judge Souter supports the concept of unenumerated rights

In clear and unequivocal terms, Judge Souter expressed support for and appreciation of the concept of unenumerated rights, stating:

> It seems clear to me that the concept of liberty is not limited by the specific subjects which the incorporation doctrine by bringing, as it were, the entire corpus of the stated Bill of Rights into the concept of the Liberty Clause

> [of the 14th Amendment]. Liberty is not so limited. (Transcript, Sept. 14, at 9.)

He added in response to questioning by Senator Grassley that it is important to recognize "rights which are implicit in the text of the Constitution itself, * * * which * * * it is the responsibility of the judiciary to find and to state in ways that we can understand." (Transcript, Sept. 14, at 18.)

Elaborating on this view, Judge Souter testified that the Ninth Amendment is "an acknowledgement that the enumeration [of rights in the Bill of Rights] was not intended to be in some sense exhaustive and in derogation of other rights retained." He added that he "do[es] not have a basis for doubting that somewhat obvious and straightforward meaning of the text." (Transcript, Sept. 13, at 108.)

2. Judge Souter supports a right to privacy enforced through the due process clause of the 14th amendment

In response to my questioning, Judge Souter made clear that he also fully supports a general, unenumerated right to privacy. In the nominee's words: "I believe that the Due Process Clause of the 14th Amendment does recognize and does protect an unenumerated right to privacy." (Transcript, Sept. 13, at 103.) Judge Souter left no doubt that his constitutional anchor for such a right is the Due Process Clause, as he testified that "the concept of liberty as enforceable under the Due Process Clause is, in fact, the means by which we enforce those [unenumerated] rights." (Transcript, Sept. 13, at 110.)

Elaborating on this issue in response to questioning by Senator Grassley, Judge Souter said:

> As I indicated to [the Chairman], I think that a fair reading of the Constitution of the United States * * * compels the conclusion that there were values, in the case of our discussion a value of privacy, which were intended to be protected even though they were not spelled out in black-letter detail. (Transcript, Sept. 14, at 8.)

3. Judge Souter supports a right of marital privacy

Judge Souter's testimony included his express support for a marital right to privacy as recognized by the Court in its landmark decision a quarter-century ago, *Griswold* v. *Connecticut,* 381 U.S. 479 (1965). While not specifically commenting per se on the decision in *Griswold,* Judge Souter testified that "on reliable interpretive principles there is certainly * * * a core of privacy which is identified as marital privacy, and I believe it can and should be regarded as fundamental." (Transcript, Sept. 13, at 112–13 (emphasis added).) He added that "my concept of an enforceable right to marital privacy would give it fundamental importance." (Transcript, Sept. 13, at 114.)

In response to my question as to whether Judge Souter considered "procreation * * * a fundamental right," the nominee responded: "I would assume that if we are going to have any core concept of marital privacy, that would certainly have to rank at its fundamental heart." (Transcript, Sept. 13, at 116.)

B. JUDGE SOUTER REJECTED JUSTICE SCALIA'S VIEW THAT THE COURT MUST LOOK TO THE "MOST SPECIFIC TRADITION AVAILABLE" WHEN DETERMINING WHETHER AN ASSERTED LIBERTY INTEREST WARRANTS CONSTITUTIONAL PROTECTION

A critical and emerging debate on the Supreme Court in the area of privacy and unenumerated rights is the methodology—the mode of analysis—that the Court will use when asked to identify and protect an asserted liberty interest. A core question is whether, in examining this nation's history and tradition, the Court will protect only those interests supported by a specific and longlasting tradition, or whether the Court will not so constrict its analysis.

The importance of this issue was highlighted in the Court's recent decision in *Michael H.* v. *Gerald D.,* 109 S. Ct. 2333 (1989). In that case, a majority of the Court concluded that a biological father does not have a constitutionally protected liberty interest in the relationship with a child conceived through an adulterous relationship.

In footnote six in *Michael H.,* Justice Scalia, joined only by Chief Justice Rehnquist, proposed a methodology for identifying liberty interests based on "the most specific level at which a relevant tradition protecting, or denying protection to, the asserted right can be identified." (109 S. Ct. at 2344, n. 6.) In contrast, Justices O'Connor and Kennedy, while joining all other parts of Justice Scalia's opinion, concurred separately in order to note their express rejection of this methodology. In their view, Justice Scalia—

> sketche[d] a mode of historical analysis to be used when identifying liberty interests protected by the Due Process Clause of the Fourteenth Amendment *that may be somewhat inconsistent with our past decisions in this area.* [citing *Griswold and Eisenstadt* v. *Baird,* 405 U.S. 438 (1972)]. On occasion the Court has characterized relevant traditions protecting asserted rights at levels of generality that might not be 'the most specific traditions' available. *I would not foreclose the unanticipated by the prior imposition of a single mode of historical analysis.*" (Id. at 2346–47 (O'Connor, J., concurring) (emphasis added).)

I discussed this methodological issue with Judge Souter on several occasions:

> Chairman BIDEN. [C]ould you tell me which of the two methodologies you would employ?
>
> Judge SOUTER. *I could not accept the view that, as a rule always to be applied, the most specific evidence is the only valid evidence* * * *. [I]t seems to me that the quest for the kind of evidence that we are after should be a quest not for evidence which, as a matter of definition or a matter of absolute necessity has either got to be of narrow compass or of general compass, rather, it has got to be a quest for reliable evidence, *and there may be reliable evi-*

> *dence of great generality.*" (Transcript, Sept. 14, at 160 (emphasis added).)

* * * * *

> Chairman Biden. [D]o you think we need to determine * * * the narrowest application of the right asserted, or a broader application of the right asserted?
>
> Judge Souter. The answer is we cannot, as a matter of definition at the beginning of our inquiry, narrow the acceptable evidence to the most narrow evidence possible * * *. (Transcript, Sept. 14, at 161.)

Furthermore, Judge Souter testified that the relevant tradition need not exist for any set length of time before it will support recognition of the protection for an asserted liberty interest. He said that—

> it is fair to say that you look at the whole continuum for whatever evidence may be worth * * *. I do not thing there is a point at which you can say, well, I draw the line and I will consider no evidence after this point or no evidence before this point. (Transcripts, Sept. 17, at 277–78.)[3]

Justice Scalia's approach is, in my view, unduly narrow, misguided, and fundamentally at odds with the Constitution's majestic and capacious language. If a majority of the Court had adhered to it during the past 25 years, numerous decisions would have been resolved differently. For example, Justice Scalia's approach would have meant that the statute prohibiting interracial marriages struck down in *Loving* v. *Virginia,* 388 U.S. 1 (1967), would have been upheld, since there is no specific tradition recognizing the right of interracial couples to marry.

On the fundamental question presented in *Michael H.* Then, I am encouraged by Judge Souter's express rejection of Justice Scalia's approach, and his willingness to search for "reliable evidence of great generality."

C. CERTAIN ASPECTS OF JUDGE SOUTER'S TESTIMONY ARE TROUBLING AND UNSETTLING

1. *Judge Souter did not acknowledge that the due process clause of the 14th amendment supports the right of unmarried individuals to use contraception*

A troubling aspect of Judge Souter's testimony on privacy and unenumerated rights is his refusal to acknowledge a rationale for the right of unmarried couples to use contraceptives that is grounded in the Due Process Clause, rather than the Equal Protection Clause, of the Fourteenth Amendment.

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[3] Along these same lines, Judge Souter parted with a methodology linked to a concept of "ordered liberty," noting that he, like Justice Harlan, would "make a search somewhat further afield than that." (Transcript, Sept. 14, at 9–10.) Elaborating on this view, he added:

> I am convinced that Justice Harlan . . . was, in effect, asking for a broader inquiry than we might be engaging in if we limited ourselves to the . . . concept of ordered liberty, because, as was demonstrated in many other cases, there are many limitations upon what we regard as almost garden variety constitutional rights which still could be found in a society which we would not say was fundamentally unjust. (Transcript, Sept. 14, at 22.)

In *Eisenstadt* v. *Baird,* 405 U.S. 438 (1972), the Supreme Court addressed the question of whether unmarried individuals have a constitutional right to use contraception. When I asked Judge Scouter About *Eisenstadt,* the nominee correctly noted that the case had been analyzed on equal protection, and not on due process, grounds, and he indicated his support for the Court's equal protection analysis. (Transcript, Sept. 13, at 111–12.) Despite repeated questioning by Senator Metzenbaum, Senator Leahy, and I, Judge Souter refused to acknowledge support for a rationale grounded in the Due Process Clause of the Fourteenth Amendment. In his view:

> The case has not been decided and the privacy analysis that would be its first step simply has not been done * * *. *That is an open question.* (Transcript, Sept. 17, at 230; emphasis added.)

Judge Souter's approach to this question is worrisome. Indeed, while Judge Souter correctly noted that the specific holding of the Court in *Eisenstadt* was predicated on the Equal Protection Clause of the Fourteenth Amendment, he ignored the Court's oft-repeated statement regarding the privacy rights of individuals:

> It is true that in *Griswold* the right of privacy in question inhered in the marital relationship. Yet the married couple is not an independent entity with a mind and heart of its own, but an association of two individuals each with a separate intellectual and emotional makeup. If the right of privacy means anything, it is the right of the *individual, married or single,* to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child. *(Eisenstadt,* 405 U.S. at 453 (emphasis added).)

Thus, I believe that the right of single individuals to use contraception—far from being an "open question"—is indeed quite settled, as the Supreme Court's case law during the past 18 years has illustrated.

Nonetheless, I find some encouragement in Judge Souter's testimony in the context of discussing the *Michael H.* case. There, he testified that the appropriate inquiry in identifying and protecting liberty interests under the Due Process Clause of the Fourteenth Amendment was not to look for the most specific tradition available but to look instead for more general traditions, and that "there may be reliable evidence of great generality." (Transcript, Sept. 14, at 160.) Such an inquiry, were Judge Souter to undertake it, could support a finding by the nominee that unmarried individuals have a fundamental right to use contraceptives.

2. Judge Souter refused to testify in any respect about issues pertaining to reproductive freedom

Judge Souter refused to answer questions pertaining to reproductive freedom that, in my view, he could have answered without compromising his judicial independence or indicating how he would vote on a request to overrule *Roe* v. *Wade,* 410 U.S. 113 (1973)—particularly given his willingness to testify quite specifically about issues that are currently pending before the Court or are at least unresolved.

To understand my belief that Judge Souter could have answered a number of questions pertaining to reproductive freedom, it is necessary to review the Supreme Court's method of analysis in this area. In analyzing unenumerated rights under the Due Process Clause of the Fourteenth Amendment, the Supreme Court examines two operative questions. First, does the claimant have a protected liberty interest with which a governmental body is interfering? Second, assuming there is some interference with a protected liberty interest, does the government has sufficient justification for doing so?

If, in answering the first inquiry, the Court determines that a "fundamental right" is at stake, it will apply "strict scrutiny" to the challenged law or regulation; the Court will ask whether the law or regulation is narrowly tailored to advance a compelling state interest. If, on the other hand, the Court determines that a "ordinary right" is at stake, it will evaluate the challenged law or regulation under the "rational basis" standard—asking whether there is any plausible reason for that law or regulation.

During the hearing, I described this two-part analysis in this way:

> [First] is the value placed upon the liberty interest that is * * * constitutionally protected by the Court * * *. [S]econd is what the Court would conclude to be sufficient evidence to meet the test required under the law, to provide countervailing weight to interpose the State between the woman and that right. (Transcript, Sept. 14, at 142.)

In questioning Judge Souter on reproductive freedom, I focused on the first part of this analysis, asking Judge Souter to weigh the value of a woman's liberty interest not to remain pregnant. Judge Souter repeatedly refused to comment on whether he believes a woman's liberty interest to choose not to remain pregnant is an "ordinary right" or a "fundamental right," even though responding to such questioning in no way indicated, much less suggested, how he would rule on a case challenging the Supreme Court's 1973 decision in *Roe* v. *Wade.*

Illustrative is the following exchange I had with Judge Souter:

> Chairman Biden. [L]et us say that a woman and/or her mate uses * * * a birth control device and it fails. Does she still have a constitutional right to choose not to become pregnant?
>
> Judge Souter. Senator, that is the point at which I will have to exercise the prerogative * * * [not to answer]. I think for me to start answering that question, in effect, is for me to start discussing the concept of *Roe* v. *Wade*. (Transcript, Sept. 13, at 117.)

Judge Souter could have answered this question without indicating in any way how he would rule on a challenge to *Roe* v. *Wade*, the specific issue on which, commendably, he did not want to comment. As I explained:

> [I]f you are willing to discuss * * * whether or not this fundamental right of privacy of a married woman regarding pro-

> creation * * * ceases at the time she becomes pregnant, or continues for some period of time, you would have not answered in any way how you would rule on *Roe* v. *Wade* because if there is a fundamental right that exists, the State must have an extraordinary reason to interpose itself between the mother's judgment and her state of pregnancy or non-pregnancy. *What you consider to be an overwhelming reason is something I am not asking you.* (Transcript, Sept. 14, at 143–44 (emphasis added).)

Curiously, while Judge Souter stopped short of answering any questions regarding reproductive freedom and the Due Process Clause of the Fourteenth Amendment, he discussed freely several issues that are either pending before the Court or at least have not been resolved definitely. Three such issues on which he commented were the standard of review in gender discrimination cases (Transcript, Sept. 13, at 147, 215–17), the standard of review under the Free Exercise Clause of the First Amendment (Transcript, Sept. 14, at 46, 49, 152), and the constitutionality of capital punishment. (Transcript, Sept. 17, at 61.) I remain unpersuaded that these areas are so much more "settled" than the area of reproductive freedom that Judge Souter could appropriately testify about the former and not the latter.

Nonetheless—and importantly—Judge Souter did testify, in response to Senator Kohl's question, "do [you] have an opinion on *Roe* v. *Wade*?" that:

> I have not got any agenda on what should be done with *Roe* v. *Wade*, if that case were brought before me. I will listen to both sides of that case. *I have not made up my mind and I do not go on the Court saying I must go one way or I must go another way.* (Transcript, Sept. 27, at 129 (emphasis added).)

This statement goes a step further than refusing to tell the committee his view on reproductive freedom, and tells us—if Judge Souter is to be believed, and I do believe him—that his mind is an open one.

* * * * * * *

Judge Souter's testimony in this area was mixed at best. While his support for unenumerated rights and marital privacy are quite encouraging—particularly given the nominee's blank record on these issues before the hearings) I remain troubled by his view that whether unmarried individuals have a right to use contraceptives in an "open question." And I remain unpersuaded that his reticence on the issue of reproductive freedom was necessary, as he asserted, to maintain his judicial independence.

Nonetheless, Judge Souter's expansive methodology for interpreting privacy rights generally, and his genuine open-minded view of a woman's privacy right after conception, provide a basis for consenting to his nomination.

PART THREE: JUDGE SOUTER'S VIEWS ON RACE DISCRIMINATION

Judge Souter has little record on matters related to racial discrimination. As a Justice on the New Hampshire Supreme Court, he wrote no opinions in cases concerning racial discrimination, and he was involved in few such matters as Attorney General.

In the hearings, however, Judge Souter stated his personal position:

> [W]ith respect to the societal problems of the United States today there is none which, in my judgment, is more tragic or more demanding of the efforts of every American in the Congress and out of the Congress than the removal of societal discrimination in matters of race and in matters of invidious discrimination which we are unfortunately too familiar with. (Transcript, Sept. 13, at 150.)

Judge Souter also addressed two vitally important civil rights issues in the hearings: affirmative action, and the scope of Congress's power under Section 5 of the Fourteenth Amendment.

A. JUDGE SOUTER'S VIEWS ON AFFIRMATIVE ACTION

Judge Souter stated that affirmative action, in the sense of race conscious measures, was "inevitable:"

> Senator SPECTER. [D]o you believe that it is appropriate in some circumstances that race is a factor to be considered * * *?
>
> Judge SOUTER. Well, I think it is inevitable. * * * The proposition which *Metro* [*Broadcasting, Inc.* v. *FCC,* 110 S.Ct. 2997 (1990) stands for is that the congressional power of engage in * * * limited remedial action, which does indeed take some account of race, is to be judged under the middle-tier standard of scrutiny. * * *
>
> Therefore *Metro* is one step in what I assume will be a long line of cases that is going to result in the definition of the scope of congressional power over * * * remedial legislation with race conscious references. (Transcript, Sept. 17, at 253–54.)

Judge Souter also described some of the circumstances in which race-conscious relief might be appropriate. For example, in response to Senator Simon's question whether a New Hampshire newspaper story in 1976 had accurately quoted him as calling affirmative action "affirmative discrimination," Judge Souter stated:

> * * * I hope that was not the exact quote because I don't believe that. The kind of discrimination I was talking about in that speech was * * * a discrimination in the sense that benefits were to be distributed according to some formula of racial distribution, having nothing to do with any remedial purpose but simply for the sake of reflecting a racial distribution. (Transcript, Sept. 14, at 111.)

Judge Souter went on to explain the forms of affirmative action of which he approved:

> I would suppose it would go without saying today that if we are in the United States to have the kind of society which I described yesterday as the society which I knew or found reflected in my home, there will be a need—and I am afraid for a longer time than we would like to say—a

> need for the affirmative action which seeks out qualified people who have been discouraged by generations of societal discrimination from taking their place in the mainstream and in all of America and in all the distribution of its benefits and its burdens. That is an obligation of individuals, and it is an obligation of government.
>
> I think it also goes without saying that when we consider the power of the judiciary to remedy discrimination which has been proven before the judiciary, the appropriate response is not simply to say stop doing it. The appropriate response, wherever it is possible, is to say undo it. That is a judicial obligation to make good on the Fourteenth Amendment. (Transcript, Sept. 14, at 111–12.)

In response to questions from me, Judge Souter further explained his views:

> The CHAIRMAN. Judge, when you say specific remedy for a specific situation, do you mean specific remedy for a specific individual, or do you mean specific remedy for a specific situation?
>
> Judge SOUTER. Identifiable class within a situation, yes * * *. I think the difficulty that you have * * * [is] how far you go to the point where you carry yourself across the line from a remedial order to an order which addresses a societal and not a remedial problem. And I don't know how you draw that line in the abstract * * *.
>
> The CHAIRMAN. [Y]ou are not just merely limiting the need for government to respond to stop, but as well as undo, to the case where a specific individual is asserting they were a victim of a specific act of prejudice that is outlawed. But you were talking more broadly. Is that correct?
>
> Judge SOUTER. That is right * * *. There are going to be some cases in which the only thing that is going to be proven is going to be a specific act of discrimination. There are going to be other cases, in fact, in what is proven is, in fact, a far broader but proven discrimination. And the remedy must be tailored to the proof. (Transcript, Sept. 14, at 113–14.)

Many aspects of this testimony are encouraging. Judge Souter suggested that affirmative action, in the sense of race-conscious measures, is here to stay in at least some forms. He recognized, and appeared to approve, Congress' preeminent role in remedying discrimination by adopting affirmative action measures. He also approved of two of the most important specific contexts in which affirmative action measures are used: as judicial remedies for systemic discrimination, and as a means of overcoming a legacy of discrimination that has discouraged many qualified members of minority groups from taking their place in American society.

On the other hand, in several respects these statements are crefully hedged in a way that leaves open the possibility that Judge Souter's views on affirmative action may be highly restrictive. Judge Souter seemed to suggest that he believed affirmative action was appropriate only when it served a "remedial" purpose, and not when it sought some forward-looking social objective. This is inconsistent with the ruling in *Metro Broadcasting*, which held that, at least in connection with affirmative action plans endorsed by Congress, race-conscious measures may be aimed at such forward-looking objectives as diversity and need not be purely remedial.

In addition, Judge Souter's endorsement of affirmative action that "seeks out qualified people who have been discouraged" by discrimination could be limited to outreach and recruiting efforts. Many governments and countless private parties have found that such efforts along are not enough to overcome the deterrent effects of a legacy of discrimination, and that race-conscious hiring, school admissions, contracting, and other practices are indispensable.

B. CONGRESSIONAL POWER UNDER SECTION 5 OF THE FOURTEENTH AMENDMENT

To a degree, my uncertainty about Judge Souter's views on affirmative action is mitigated by his views on Congress's power under Section 5 of the Fourteenth Amendment. In his testimony, Judge Souter frequently lauded what he described as a trend toward increased Congressional use of the Section 5 power. (See, e.g., Transcript, Sept. 14, at 14.) Judge Souter's response to Senator Specter's question about race-conscious remedies, quoted above, distinguished between congressional power, on the other hand, and state and local governments' power, on the other. And Judge Souter further explained:

> There is no question that, under the law as it is understood today and under the law as I understand it, that Congress has a preferred an unique role of power in enforcing the Fourteenth Amendment under Section 5.
>
> There is probably no question that there will be further years of litigation before the exact limits of that power are defined, but there are some things that are clear now. It is clear now that under the law that the Congress certainly does not stand on the same footing as the State and county and local governments may do in devising remedies for a broader societal discrimination than may come to light in specific cases. We know that the Congress has a preferred position in that respect. (Transcript, Sept. 13, at 142–43)

Again, these remarks are not unequivocal; I would prefer a more decisive statement in this area. To some extent Judge Souter seems to be describing existing law, rather than stating his view. The statement that Congress's power is greater than that of state and local governments is strictly comparative; it does not mean that Congress has broad power to adopt innovative solutions in this area. And state and local remedies are themselves highly important; unilateral congressional action in this area is not desirable.

Nonetheless, the tone of Judge Souter's remarks is highly encouraging, and I am loath to ascribe to him an intention to use carefully-phrased formulations that concealed his true views. In addition, Judge Souter indicated no disagreement with the broad scope given to congressional power under existing law. Indeed he stated that broad congressional authority was not only existing law but "the law as I understand it."

On balance, although I have significant concerns, I am encouraged by Judge Souter's testimony about affirmative action and congressional power under the Fourteenth Amendment.

C. JUDGE SOUTER'S ACTIONS AS ATTORNEY GENERAL

As Attorney General of New Hampshire, Judge Souter took a much narrower view of Congressional power under Section 5 to remedy racial discrimination.

1. EEOC Reporting Requirements.

In one case, Judge Souter, as Attorney General, contended that both the employment discrimination statutes and the Constitution barred the Equal Employment Opportunity Commission from enforcing against New Hampshire a regulation that required all employers (including state governments) to report the racial composition of their workforce. His argument was that such a requirement should not be allowed in the absence of some showing that a state had engaged in discrimination. Judge Souter pursued this argument not only to the First Circuit but in a certiorari petition to the Supreme Court. His position lost in the First Circuit (*United States* v. *New Hampshire*, 539 F.2d 277 (1st Cir. 1976)), and the Supreme Court denied certiorari.

Judge Souter's position in this case reflects an unjustifiably narrow interpretation of congressional authority, as well as an insensitivity to the practicalities of enforcing equal opportunity laws. It is wholly implausible to suppose that Congress, or its enforcement agency, must proceed state-by-state, or locality-by-locality, in enforcing laws addressed to a pressing national problem.

In addition, the certiorari petition tries to cast he case as one raising the issue of quotas, even though the case does not concern quotas at all. (See petition for a Writ of Certiorari, *New Hampshire* v. *United States*, No. 76-453, (filed Sept. 28, 1976), at 6-13.) It is about an auditing requirement that is needed to enforce the well-established and universally supported laws forbidding discrimination against minorities. The quick resort to anti-"quota" rhetoric is a significant warning flag.

I am mindful, of course, that a state Attorney General has an obligation to defend the actions and policies of the state even when his own views are at variance with them, and even when he would not, if he were a judge, adopt the arguments he is making as an advocate. For that reason, I do not attach overriding significance to Judge Souter's actions in this case. But I do believe that the conduct of the litigation—particularly the decision to pursue such an insubstantial claim to the Supreme Court, and the effort to escalate the case into a battle over "quotas"—is subject to legitimate and serious criticism.

2. Literacy Tests

In another matter, Judge Souter, then Assistant Attorney General, defended a suit filed by the United States that challenged New Hampshire's literacy test for voting. In the questionnaire that Judge Souter filed with the committee, he listed this case as one of the ten most significant he had participated in. Judge Souter took the position that the Voting Rights Act of 1970, which suspended literacy tests nationwide, could not constitutionally be applied to New Hampshire because there was no record that the state had used the test to discriminate. Judge Souter's arguments were rejected by a district court, and the Supreme Court, in another case decided shortly thereafter, settled the issue adversely to Judge Souter's position. (*Oregon* v. *Mitchell*, 400 U.S. 112 (1970).)

Although Judge Souter's view of congressional authority was again obviously and unrealistically too narrow, Judge Souter's actions in this case trouble me far less than his actions in the EEOC case. Judge Souter was not in a policy-making position in the Attorney General's office when he defended this litigation. In addition, the Supreme Court had held that nondiscriminatory literacy tests did not violate the Equal Protection Clause. (*Lassiter* v. *Northampton County Board of Election*, 360 U.S. 45 (1959).) The issue in the case was pending before the Supreme Court in *Oregon* v. *Mitchell*. In these circumstances, Judge Souter cannot be harshly faulted for defending the suit.

One matter connected to this lawsuit does trouble me, however. In testimony concerning the state's position in the literacy test case, Judge Souter showed little sensitivity to the practical implications of his position—the fact that he sought to defend the disenfranchisement of a particularly vulnerable segment of the population. At one point, when asked by Senator Kennedy about this statement that allowing persons who could not pass the test to vote would "dilute" the votes of other citizens (the document filed by Assistant Attorney Souter had used the expression "watering the vote"), Judge Souter replied that that was "a mathematical statement * * * essentially a kind of statement of math." (Transcript, Sept. 14, at 195.)

While a "dilution" argument may have been logically accurate and tactically defensible in the litigation, Judge Souter's response that it was a matter of "mathematics" suggests that he is not always attuned to the human dimensions of legal abstractions. Again, I am loath to make too much of a single remark. But in context, it does raise concern whether Judge Souter fully recognizes the extent of the responsibility that the Supreme Court bears for the well-being of the least fortunate in society.

D. JUDGE SOUTER'S REMARK ABOUT THE ABSENCE OF RACIAL PROBLEMS IN NEW HAMPSHIRE

Several witnesses who testified after Judge Souter took him to task for making the comment, during his testimony, that "[t]he State of New Hampshire does not have racial problems." (Transcript, Sept. 13, at 198.) Out of context, this remark seems seriously insensitive. No part of the country has been immune from racial discrimination.

Yet when placed in context, the remark is less troubling. The context was Senator Simpson's question whether Judge Souter was "a racist." Judge Souter said "The answer is, no" and then continued:

> In a way, I think that answer might have been impressive to some people if I had grown up in a place with

> racial problems, and some people have pointed out that I did not. The State of New Hampshire does not have racial problems.
>
> So you can ask, well, what indication is there, really, as to whether you mean it or not * * *. (Transcript, Sept. 13, at 198.)

Judge Souter then explained how experiences in his home and with friends made him sensitive to the wrong of discrimination.

In context, Judge Souter's remark appears not to be an insensitive boast about his state but more nearly the opposite—a recognition that others might view him as coming from a relatively sheltered environment in which he would not have been exposed, to the same degree, to issues pertaining to racial discrimination.

That is, Judge Souter's remark might be seen as part of an acknowledgement that because of his background, he would bear a greater burden of persuading the public that he understood issues of racial discrimination. It was a recognition that victims of racial discrimination, and others concerned about discrimination, may be skeptical that a lifelong resident of a state that has not been in the maelstrom would have the necessary experience.

Judge Souter surely could have—and should have—used more careful language to make this point. It is fully understandable why people reading the cold text would be alarmed by the remark. But I am not inclined to infer that Judge Souter is insensitive to racial issues on the basis of this remark alone.

PART FOUR: JUDGE SOUTER'S VIEWS ON GENDER DISCRIMINATION

The central debate in the application of the Equal Protection Clause of the Fourteenth Amendment to gender discrimination concerns the standard of review that should apply in such cases. That standard is a presumptive guide to courts to use in evaluating claims of gender discrimination. Though, unfortunately, Judge Souter failed to indicate just how vigorously courts should review laws that discriminate against women, his testimony did demonstrate a commendable concern for ensuring that a middle-tier standard provide sufficient protection against gender discrimination.

A. THE DEVELOPMENT OF "MIDDLE TIER" REVIEW

Prior to the 1970s, the Supreme Court used a "reasonableness" test to uphold a variety of onerous and stereotypic legislative classifications based on gender. In 1873, for example, the Supreme Court found it reasonable to exclude women from the practice of law. (*Bradwell* v. *Illinois,* 83 U.S. 130, 140–42 (1873).) In 1924, the Court found no "unreasonable * * * classification" in a law that excluded women, "considering their more delicate organism," from late-evening restaurant employment. (*Radice* v. *New York,* 264 U.S. 293, 294, 296 (1924).) And in 1961, a unanimous Supreme Court found a state's exemption of women from jury service (unless they volunteered) to be based on a "reasonable classification" in light of how, "[d]espite [their] enlightened emancipation," women are "still * * * the center of home and family life." (*Hoyt* v. *Florida,* 368 U.S. 57, 61–62 (1961).)

But beginning in 1971, with the decision in *Reed* v. *Reed,* 404 U.S. 71 (1971), and continuing in 1976, with the decision in *Craig* v. *Boren,* 429 U.S. 190 (1976), the Court broke from this older view and began to utilize a middle-tier standard of review of discriminatory laws. This standard is more exacting than the "reasonableness" test applied to economic regulations, yet less stringent than the "strict scrutiny" test applied in the review of race-based distinctions. Under this standard of review, the Court determines whether the classification is "substantially related" to an "important governmental objective." Moreover, this test must be applied "free of fixed notions concerning the roles and abilities of males and females;" the statutory objective cannot reflect "archaic and stereotypic notions" about men and women. (*Mississippi University for Women* v. *Hogan,* 458 U.S. 717, 724–25 (1982).)

B. JUDGE SOUTER REJECTS A REASONABLENESS TEST AND SUPPORTS A FORM OF MIDDLE-TIER REVIEW GIVING CLOSE EXAMINATION TO GENDER DISCRIMINATING CASES

Judge Souter made clear in his testimony that he firmly rejects a reasonableness test for evaluating gender discrimination claims, and that he supports a standard of review that will give close examination to gender discrimination claims.[4]

During the first day of hearings, Senator Kennedy and Judge Souter engaged in the following colloquy concerning the reasonableness standard:

> Senator KENNEDY. [D]o you think the Court should go back to uphold statutes that discriminate by sex if there is any plausible reason for the distinction?
>
> JUDGE SOUTER. No. That is not my position * * *. I think that * * * to compare sex discriminations with common economic determinations seems to me totally inappropriate. * * *
>
> Senator KENNEDY. [D]o you * * * think that statutes that discriminate on the basis of sex should receive very close examination?
>
> Judge SOUTER. I do not think there is any question about it. (Transcript, Sept. 13, at 155, 157, 158.)

Judge Souter reiterated in response to questioning from me that "[t]here has got to be something other than just threshold level scrutiny" for gender discrimination claims. (Transcript, Sept. 13, at 160; see also Transcript, Sept. 14, at 150 ("we must recognize that it [gender discrimination] is more important than minimum scrutiny").) The nominee added in response to questioning from Senator DeConcini as well that "I am certainly satisfied that it would be too blunt a set of instruments, just to have one test at the bottom and one test, if you will, at the top." (Transcript, Sept. 13, at 217.)

Judge Souter went on to say that his principal concern with the middle-tier level of review is that "it leaves an enormous amount of leeway to the discretion of the Court that is doing the reviewing." This concern, he said, is that middle-tier review will collapse into rational basis review—a concern, as Judge Souter put it, that courts treat middle-level review "as nothing more than the first tier rational basis test * * *." (Transcript, Sept. 13, at 156.) "[I]f that happens," he testified in response to questioning from Senator DeConcini, "somebody with a classification claim is going to get short-changed." (Transcript, Sept. 13, at 211.)

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[4] Judge Souter testified that while he has concerns about the Court's reliance on three tiers of scrutiny, "I have not gotten to the point of saying we ought to scrap the whole notion of three tiers and just take, in effect, every issue as an original balancing issue in the first instance." (Transcript, Sept. 13, at 217.)

As a result, much of Judge Souter's testimony focused on the need to devise a "workable and dependable" middle-tier test—one that "does not suffer from the capacity of a court, as a practical matter, to read [the standard] back down to the lowest level of scrutiny, if it is inclined to do so." (Transcript, Sept. 13, at 157.) Judge Souter emphasized:

> "The trouble with the middle-tier test is that *it is not a good, sound protection.*" (Transcript, Sept. 13, at 157; emphasis added.)

Regrettably, Judge Souter did not articulate his own formulation of a middle-tier standard. (Transcript, Sept. 13, at 160, 210; Sept. 14, at 149.) I have some reservation, therefore, about how he will ultimately apply the standard in gender discrimination cases.

Nonetheless, I take the nominee at his word. I take from his testimony an interest in strengthening a standard that he believes—because, in his words, it has "undue flexibility" (Transcript, Sept. 13, at 160)—may sometimes resemble the unacceptably weak reasonableness approach. While I would have preferred a more definitive indicator that this was Judge Souter's view, the tone of his testimony strongly suggested as much. Indeed, Judge Souter did not foreclose the possibility of applying strict scrutiny to gender discrimination claims. (Transcript, Sept. 13, at 211.)

Part Five: Judge Souter's Views on Religious Freedom

Few areas of constitutional law are in as much ferment as the doctrines under the First Amendment's two guarantees of religious freedom—the Free Exercise Clause and the Establishment Clause. The Supreme Court has been badly divided in recent Establishment Clause cases, and Judge Souter's vote, if he is confirmed, might well be decisive. (See, e.g., *Lynch* v. *Donnelly*, 465 U.S. 668 (1984).) In the Free Exercise area, the Court recently approved a major doctrinal shift by a 5-4 vote. (*Employment Division of Oregon* v. *Smith*, 110 S. Ct. 1595 (1990).) While Justice Brennan was in the minority, Judge Souter's vote could be crucial in determining whether this case has great generative significance.

Accordingly, Judge Souter's approach to this area is of the first importance.

A. THE FREE EXERCISE CLAUSE

Judge Souter was specifically asked about *Employment Division of Oregon* v. *Smith*, the Free Exercise Clause decision that, in Justice O'Connor's words, "dramatically departs from well-settled First Amendment jurisprudence." (110 S. Ct. at 1606) (O'Connor, J., concurring).) Under prior law, government actions that are neutral on their face and in intent were subject to strict scrutiny if they have an adverse effect on a religious practice. Under *Smith*, they need only have a rational basis.

When asked about *Smith*, Judge Souter, after noting that he did not wish to comment on the specifics of the case or to suggest any commitment about how he might vote on the issue if he were to be confirmed, remarked:

> I have not personally had any reasons to raise questions about the appropriateness of the strict scrutiny test, and have no reasons to raise questions about the apppropriateness of the strict scrutiny test for Free Exercise cases. (Transcript, Sept. 14, at 46.)

Judge Souter also suggested that he disagreed with the approach the *Smith* majority used to limit the precedents that had set out the strict scrutiny standard. (Transcript, Sept. 14, at 48.)

I do not wish to suggest that I support confirmation of Judge Souter because he disagreed with the result in *Smith*. As I noted, Judge Souter refrained from commenting on the specific case. But his approach shows sensitivity to the problem at the core of *Smith* and of modern Free Exercise Clause doctrine—the problem of adjusting government action to religous practice in a pluralistic society.

B. SCHOOL PRAYER

In his testimony, Judge Souter also showed commendable sensitivity in discussing another religious issue—compulsory school prraryer. Senator Simon described to Judge Souter a situation in which a Jewish student was excused from his elementary school class each morning while the other students recited a prayer. Judge Souter, in response, declared:

> I think to begin with it is an appalling fact. I happen to have a friend who is on the bench who described exactly the same experience to me growing up in Manchester, New Hampshire. He was Jewish. He didn't leave the room every morning, but he was cut apart from the rest of his class when the Christian Lord's Prayer was recited. (Transcript, Sept. 14, at 106.)

Judge Souter stated that these "exclusionry effect[s]" of compulsory school prayer on students who are members of minority religions would "certainly violate" First Amendment principles as he understood them. (Transcript, Sept. 14, at 106–07.)

School prayer was a subject of some concern before the hearings because of a 1976 story in the Concord Monitor reporting that Judge Souter, then Attorney General of New Hampshire, said that he would defend a state law permitting school districts to authorize school prayer. Since this reported statement was made to newspapers—not in the course of litigation, in which Judge Souter would have had an obligation to represent his client—it raised particular concern.

When Senator Leahy questioned Judge Souter about this report, Judge Souter explained that, had the issue been raised in court, "I think probably I would have had to state to the court * * * that the law couldn't be enforced * * *. I was ready to do everything I could to defend that or any State statute. But I think if we had gotten to that point, I think we would have to have admitted that there was a constitutional deficiency." (Transcript, Sept. 17, at 102–03.)

Judge Souter's forthright statements about school prayer, coupled with his response to Senator Leahy, combine to alleviate our concerns in this area.

C. THE ESTABLISHMENT CLAUSE

Judge Souter's views on the Establishment Clause doctrine raise more serious questions. Senator Leahy, Senator Specter, and others asked Judge Souter about the traditional approach in this area, first declared in *Everson* v. *Board of Education,* 330 U.S. 1 (1947), which interprets the Establishment Clause as establishing a "wall of separation" between church and state.

Judge Souter replied that he had "no reason personally, in either research or philosophy, to want to reexamine the view which was expressed in *Everson.*" (Transcript, Sept. 17, at 47.) He added: "I do not have at this time either an agenda or a personal desire to bring about a reexamination of that position." (Transcript, Sept. 17, at 27.)

Judge Souter did, however, suggest that the Court's current interpretation of the Establishment Clause, the three-part test of *Lemon* v. *Kurtzman,* 403 U.S. 602 (1971), raised difficult issues. He specifically noted that under that standard, the Free Exercise and Establishment Clauses might come into conflict. (See, e.g., Transcript, Sept. 14, at 43–47.) But Judge Souter did not repudiate the *Lemon* test. Moreover, his objections to that standard were prompted more by concern about whether it is a workable test than by a substantive desire to aid or inhibit religious practice. His comments on this point do not, therefore, by themselves, cause me to question Judge Souter's commitment to the principles underlying the Establishment Clause.

A substantially more troubling exchange occurred when Judge Souter was asked about the view that the Establishment Clause was intended to establish a much narrower principle than "neutrality" or a "wall of separation." According to this view, the Establishment Clause should be interpreted only to forbid literal state establishments and non-neutrality among Christian sects.[5]

Judge Souter said that he did "not approach the Court with any inclination or agenda" to change the law in this fashion. (Transcript, Sept. 17, at 105.) He added that he would listen to the arguments for such a change but would give appropriately heavy weight to precedent. (Transcript, Sept. 17, at 105–07.)

I am very troubled by Judge Souter's refusal straightforwardly to reject such an extraordinarily narrow view of the Establishment Clause. The Establishment Clause is an extremely complex area of constitutional law, and few scholars—indeed, few individual Justices—are satisfied with all of the Supreme Court's decisions in the area. On many issues, it would be entirely appropriate for a putative future Justice to say that he or she needs more study and reflection before finally adopting a position.

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[5] Justice Rehnquist stated a position similar to this in *Wallace* v. *Jaffree,* 472 U.S. 38, 106 (1985) (dissenting opinion), but did not limit the requirement of neutrality to Christian sects: ("It would seem from th[e] evidence that the Establishment Clause of the First Amendment had acquired a well-established meaning; it forbade establishment of a national religion, and forbade preference among religious sects or denominations.").

But it should not take extensive study to conclude that the Establishment Clause requires more than neutrality among Christian sects. And a Justice should be prepared to adopt that position as a matter of principle, not just as a matter of stare decisis. Judge Souter's failure to do so is disquieting.

D. THE GOOD FRIDAY LITIGATION

As Attorney General, Judge Souter defended, against an Establishment Clause challenge, a proclamation by then New Hampshire Governor Thomson that required flags on state buildings to be lowered to half-mast on Good Friday. After a district court enjoined the proclamation, Judge Souter appealed to the United States Court of Appeals for the First Circuit, which issued a stay; Judge Souter than defended the stay in the Supreme Court, which vacated it.

In his testimony, Judge Souter noted that he was not involved in the drafting of the proclamation. Judge Souter further explained that he believed that a non-frivolous argument could be made in support of the proclamation, and that as state Attorney General, he had an obligation to offer such an argument if one were available. In support of his contention that such a non-frivolous argument existed, Judge Souter pointed to the stay entered by the First Circuit and to the fact that the Supreme Court vacated that stay by a vote of only 5–4. (Transcript, Sept. 14, at 30–32.)

Judge Souter also specifically stated that had he been a judge at the time, and not Attorney General, he, too, would have issued an injunction against the proclamation. (Transcript, Sept. 14, at 33.)

I do not wish to question Judge Souter's conception of his role as Attorney General. But it is far from clear that there was a substantial legal argument in support of the position Judge Souter took. Although Judge Souter's statement about how he would have ruled on the case as a judge diminishes our concerns, I am concerned that this episode reveals a degree of insensitivity to the principles underlying the Establishment Clause.

* * * * * * *

In summary, I believe that Judge Souter's approach to Free Exercise Clause questions is commendable, but I am left with serious reservations about the principles he would apply to Establishment Clause issues. Standing alone, Judge Souter's Establishment Clause record would give me the gravest concerns in this area. Taken together with the Free Exercise record, however, my concerns are sufficiently allayed so that I can consent to Judge Souter's confirmation.

PART SIX: JUDGE SOUTER'S VIEWS ON FREEDOM OF SPEECH

I questioned Judge Souter's on three core areas relating to freedom of speech under the First Amendment. In each area, the nominee supported the doctrines developed by the Supreme Court, and showed a strong dedication to the key principles at issue in this area.

A. JUDGE SOUTER EXPRESSED SUPPORT FOR AND AGREEMENT WITH THE SUPREME COURT'S PRIOR RESTRAINT DOCTRINE

The first free speech doctrine I discussed with Judge Souter related to prior restraints. I asked the nominee whether he "agreed[d] with the principles enunicated by the Court in the *Pentagon Papers* case [*New York Times Co.* v. *United States*, 403 U.S. 713 (1971)] with respect to the First Amendment doctrine of prior restraint?" Judge Souter responded: "Yes, the principle being you have got to prove your harm, and the burden of proof is the highest known in our constitutional law." (Transcript, Sept. 17, at 188.)

B. JUDGE SOUTER EXPRESSED SUPPORT FOR AND AGREEMENT WITH THE SUPREME COURT'S CORE LIBEL DOCTRINE

I next discussed the libel doctrine with the nominee, asking: "[D]o you agree with the level of protection that the Court accorded the press in its decison in *New York Times* v. *Sullivan* [376 U.S. 254 (1964)]?" Judge Souter responded:

> I think that level of protection reflects the significance of libel laws in modern society. I take that decision as a judgment by the Court that that was the only appropriate way to effect freedom of the press, given the economies of the modern society that the First Amendment protects. And I have no reason to gainsay that or second-guess it. (Transcript, Sept. 17, at 190.)

C. JUDGE SOUTER EXPRESSED SUPPORT FOR AND AGREEMENT WITH SUPREME COURT'S DECISION POLITICAL SPEECH DOCTRINE

Lastly, I asked Judge Souter about the core First Amendment doctrine relating to speech advocating law-breaking or violence—the doctrine first enunciated by Justices Holmes and Brandeis in their landmark dissents in *Abrams* v. *United States,* 250 U.S. 616 (1919), and *Gitlow* v. *New York,* 268 U.S. 652 (1925). Their dissenting view—that the Constitution allows political speech to be stopped only when there is a "clear and present danger" of violence or law-breaking—began to be adopted by the Supreme Court in the 1950s, and a similar but somewhat more stringent test eventually was accpeted by a unanimous Supreme Court in *Brandenburg* v. *Ohio,* 395 U.S. 444 (1969). The Court held in *Brandenburg* that speech calling for violence or law-breaking could be forbidden only if such speech called for, and would probably produce, "imminent lawless action."

I had the following colloquy on this principle:

> Chairman BIDEN. [D]o you agree or disagree with the free speech principles articulated by the Supreme Court in *Brandenburg* and at an earlier time the dissent articulated by Justices Holmes and Brandeis in the 1920s?
>
> Judge SOUTER. Yes, I have no reason to call them into question. (Transcript, Sept. 17, at 193.)

PART SEVEN: JUDGE SOUTER'S VIEWS ON CRIMINAL LAW

Judge Souter's testimony in the area of criminal law was generally thoughtful and well-reasoned.

For example, Judge Souter broadly described the Warren Court's decisions in the criminal law area as "pragmatic implementing decisions." (Transcript, Sept. 17, at 50.) More specifically, when discussing the Supreme Court's decision in *Miranda* v *Arizona,* 384 U.S. 436 (1966), Judge Souter testified:

> Whether one initially agreed or did not agree with *Miranda,* the point of *Mirando* was to produce a practical means to avoid what seemed to be unduly time-consuming and sometimes intractable problems encountered in the Federal courts in dealing with claims that confessions were inadmissible on grounds of their involuntariness * * *. *Mirando* was a practical case on how to deal with it. (Transcript, Sept. 13, at 137.)

He added that "I personally have looked at *Mirando* as a pragmatic decision intended to protect a right * * *." (Transcript, Sept. 17, at 52.)

Judge Souter also expressed agreement with the Court's decision in *United States* v. *Leon,* 468 U.S. 897 (1984), in which the Court recognized a good-faith exception to the exclusionary rule. (Transcript, Sept. 14, at 167-68.)

Over-all, Judge Souter's views on criminal law appeared reasonable and balanced, and well within the prevailing view of the current Supreme Court.

PART EIGHT: JUDGE SOUTER'S VIEWS ON STARE DECISIS

The doctrine of stare decisis—"to stand by things decided"—protects and promotes the stability, efficiency and legitimacy of the legal system. Judge Souter's record on the New Hampshire Supreme Court, as well as his testimony before the committee, suggest that the nominee has a healthy respect for precedent, and that he would exercise caution and prudence when asked to reverse existing doctrine.

A. WHILE A MEMBER OF THE NEW HAMPSHIRE SUPREME COURT, JUDGE SOUTER SHOWED GREAT DEFERENCE TO PRECEDENT

Judge Souter's opinions on the New Hampshire Supreme Court suggest a strong attachment to the doctrine of stare decisis, at least in the context of statutory interpretation.

For example, in two cases, he joined a majority opinion because he thought the issue was controlled by existing precedent, even though he disagreed with that precedent. (See *State* v. *Meister,* 480 A.2d 200, 205 (N.H. 1984) (concurring opinion); *Cacavas* v. *Maine Bonding and Casualty Co.,* 512 A.2d 423, 426 (N.H. 1986) (concurring opinion).) Furthermore, in one of those cases, the controlling precedent was a case that reversed a ruling Judge Souter had made as a trial judge; there was little doubt, therefore, that he disagreed with the precedent. (*State* v. *Meister,* supra.) In other cases, Judge Souter wrote a concurrence to emphasize that he could reach a result solely on the basis of precedent and did not have to engage in the extended analysis that the majority had used. (See, e.g., *Coffey* v. *Bresnahan,* 506 A.2d 310, 315 (N.H. 1986).)

It is true, of course, that these are statutory cases. As such, they are not necessarily indicative of how Judge Souter would apply stare decisis in constitutional cases, in which the Supreme Court has historically showed less deference to precedent. Nonetheless, Judge Souter's opinions on the New Hampshire Supreme Court demonstrate a strong respect for precedent in statutory cases,[6] and suggest a deference to precedent generally. They can be read to illustrate that he will not simply disregard that respect when confronted with challenges to prior decisions interpreting the Constitution.

B. JUDGE SOUTER'S TESTIMONY ALSO EVINCES A STRONG RESPECT FOR PRECEDENT

Under questioning by Senator Thurmond, Judge Souter articulated his theory of stare decisis and the "series of considerations which courts should bear in mind in deciding whether a prior precedent should be followed or should not be." (Transcript, September 13, at 135.)

The first question to be addressed, Judge Souter testified, is whether the court concludes that the precedent was correct when originally decided. He stated that if a determination is made that the case was not correctly decided, several factors must then be evaluated.[7]

The first factor listed by Judge Souter was the "degree and the kind of reliance that has been placed upon" the precedent. Elaborating on this "reliance," Judge Souter said:

> We ask in some context[s] *whether private citizens in their lives have relied upon [the precedent] in their own planning to such a degree that, in fact, it would be a great hardship in overruling it now.* (Transcript, Sept. 13, at 137 (emphasis added).)

In response to questioning by Senator Specter about the kinds of cases to which this factor would be relevant, Judge Souter made clear that "I can certainly tell you that the issue of reliance is not an issue which is limited to commercial cases." (Transcript, Sept. 17, at 247.) While Judge Souter did not elaborate on the non-commercial cases to which this factor would apply, it is encouraging that he explicitly rejected limiting this factor to the commercial context.

The second factor identified by Judge Souter is "whether legislatures have relied upon [the precedent], in legislation which assumes the correctness of that precedent." (Transcript, Sept. 13, at 137.)

The third factor he identified is "whether the court in question or other courts have relied upon it, in developing a body of doctrine." Elaborating on this factor, Judge Souter said:

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[6] The significance of this should not be taken lightly. See *Patterson* v. *McLean Credit Union,* 109 S. Ct. 2363 (1989).

[7] While not asked specifically, Judge Souter inferred that if the Court concludes that the precedent in question was originally decided correctly, the factors he articulated would not be relevant and the precedent would be followed.

> If a precedent, in fact, is consistent with a line of development which extends from its date to the present time, then the cost of overruling that precedent is, of course, going to be enormously greater and enormously different from what will be the case in instances in which the prior case either has not been followed or the prior case has simply been eroded, chipped away at, as we say, by later determinations. (Transcript, Sept. 13, at 137–38.)

Finally, Judge Souter noted the well-recognized distinction between the application of stare decisis in statutory cases and its application in constitutional cases. He suggested looking to "other means of overruling the precedent"—that is, legislation enacted by Congress—in the context of statutory cases. (Transcript, Sept. 13, at 138.)

These factors constitute a thoughtful and reasoned approach to stare decisis. Importantly, when discussing the question of reliance, Judge Souter emphasized the degree to which private citizens have relied on the case--as opposed to the reliance of governmental and private institutions, which can limit the applicability of this factor to commercial and administrative law decisions. By focusing on the degree of reliance by private citizens and by explicitly extending this factor beyond simply commercial law cases, Judge Souter appears to recognize the precedential value of decisions in the areas of civil rights and civil liberties. While I am concerned about the degree to which he would consider the fact that a prior decision had been "chipped away at," on balance I have concluded that the factors identified by Judge Souter are appropriate.

Judge Souter's approach to stare decisis is important not only because of the factors he listed, but also because of the factors he did not list. Some justices have noted, for example, that because they are oath-bound to the Constitution, they owe little or no deference to prior decisions interpreting the Constitution. Justice Scalia has argued, for example, that it would violate his oath to uphold the Constitution were he to adhere to a prior decision that he considers to be "a plainly unjustified intrusion upon the democratic process in order that the Court might save face." (*South Carolina* v. *Gathers*, 109 S. Ct. 2207, 2218 (1989) (Scalia, J., dissenting); see also Douglas, *Stare Decisis,* 49 Colum. L. Rev. 735, 736 (1949).) During his testimony on stare decisis, Judge Souter made no reference at all to this argument and in no way suggested that his oath might lessen the need to pay appropriate deference to prior constitutional decisions.

PART NINE: JUDGE SOUTER TESTIFIED THAT HE MADE NO COMMITMENTS TO THE ADMINISTRATION IN CONNECTION WITH HIS NOMINATION OR CONFIRMATION

Judge Souter testified that he made no commitment to the Administration in connection with either his nomination or confirmation.

Specifically, Senator Metzenbaum asked Judge Souter about reports of conversations between White House Chief of Staff John Sununu and members of certain conservative organizations about the nominee's views, and about any conversations the nominee may have had with the Administration that might have led Mr. Sununu to make certain reported statements. Judge Souter responded: "We did not discuss any substantive issue * * *." (Transcript, Sept. 14, at 192.) The following exchange then occurred:

> Senator METZENBAUM. How about on other issues? Did you discuss other issues with John Sununu, or others at the White House or connected with representing the White House? * * * [Did you discuss] anything that would [give him sufficient knowledge to give him this kind of assurance and to call in the representatives of the far right and to assure them that you are going to be okay?
>
> Judge SOUTER. I have not discussed that issue or given any assurance to Governor Sununu. * * * I can assure you that I gave no assurance to him at any time on that matter. And I did not discuss that matter with him at any time.
>
> Senator METZENBAUM. Did you have any discussion with him or any other person at the White House concerning issues that may or may not come before the Supreme Court?
>
> Judge SOUTER. The only discussion that I had with anyone at the White House in connection with this nomination or, for that matter, the Circuit nomination, was my conversation with the President which I think lasted about a half an hour on the afternoon that he announced his intent to nominate me. He asked for no assurance on any subject. (Transcript, Sept. 13, at 192–93.)

This is as it should be. Nominees should not, of course, give any "assurances" to anyone regarding how they would vote on particular cases that may come before the Court. Judge Souter's testimony in this respect has been reassuring, in light of news reports that had raised some concerns in this area.

CONCLUSION

In supporting the confirmation of David Hackett Souter, I am not saying that I am giving this nominee, or any other nominee, the "benefit of the doubt." Nor am I saying that a nominee need only prove himself or herself not to be extremist to win this committee's approval.

The burden of proof is on the nominee—and it is a burden that this nominee, in my view, just barely met. Any future nominee who fails to meet that burden—and again, I emphasize how close this nominee came to that line—will be vigorously opposed by me.

The Administration should be careful not to learn the wrong lesson from the committees lop-sided vote in Judge Souter's favor. Our approval is not a sign that the Senate intends to be lax about exercising its advice and consent power, or intends to use that power only to screen out extremist nominees. Rather, it is a sign that we take this power seriously, and that we intend to exercise it responsibly—and in doing so, Judge Souter falls within the sphere of candidates acceptable to this committee.

Other nominees, if more conservative than this one, could well fall outside of that sphere:

For example, a nominee who criticizes the notion of unenumerated rights, or the right to privacy, would, in my view, be unnacceptable.

A nominee whose view of the Fourteenth Amendment's Equal Protection Clause has led him or her to have a cramped vision of the Court's role in creating a more just society would, in my view, be unacceptable.

And a nominee whose vision of the First Amendment's guarantees of freedom of speech and religion would constrain those provisions' historic scope would, in my view, be unacceptable.

But Judge Souter is not such a nominee. *His vision of the Constitution is not mine—but it is clearly not that of the Court's hard-line conservatives, either. He is not a man whom I would nominate to the Court—but he is not a man whose nomination I will oppose.*

Thus, with a hopeful heart—and with open eyes—I support the confirmation of Judge David Hackett Souter.

ADDITIONAL VIEWS OF SENATOR PATRICK J. LEAHY

Since Justice Brennan's resignation, the Senate has engaged in the difficult task of determining whether David Souter is worthy of a seat on the highest court in our country. The Senate's charge to advise and consent in judicial nominations is among its most profound responsibilities, and the Judiciary Committee has proceeded to fulfill it with care and deliberation under Chairman Biden.

Some Senators have suggested that perhaps we asked too many questions of Judge Souter. I could not disagree more. The United States Constitution provides in Article II, Section 2 that the President "shall nominate, and by and with the Advice and Consent of the Senate, shall appoint * * * Judges of the Supreme Court." This advice and consent power demands thorough examination by the Senate, not apologies for asking questions. Senators serve the Senate, the American people, and the Constitution by asking thorough, probing questions of every prospective Supreme Court Justice. No Senator should ever apologize for upholding the Constitution. After all, we take an oath of office to do just that, and we should never forget that obligation.

The more answers we get, the better the Constitution is served by this process. We take such care because the individual who ascends to the Supreme Court this term will help to mold the course of American jurisprudence well into the next century. How do we determine whether a nominee deserves that trust?

The threshold qualifications are competence, honesty and integrity. Judge Souter's record, combined with his performance in two-and-a-half days of testimony, convince me that he is intelligent, learned, forthright, and honorable. But those attributes are no more than prerequisites for the job. They mark only the beginning of our deliberations.

The next level of inquiry is whether Judge Souter will respect the fundamental rights and liberties that Americans have fought for two centuries to preserve.

Does Judge Souter accept the First Amendment as protecting our right to speak and worship as we believe, to articulate our grievances and express them to our government, and to benefit from a free press?

Does Judge Souter respect the freedom from government interference in our private lives that Americans have come to expect and enjoy?

Does Judge Souter commit himself to ensuring that the rights and opportunities that uniquely characterize our society will be equally available to all, regardless of race or gender?

The Judiciary Committee has reviewed every aspect of Judge Souter's judicial and legal career. We have questioned him about his tenure in the Attorney General's office, his years in the New

Hampshire state courts, and his current views on a wide range of legal and social issues.

Based on this record, I believe that Judge Souter will not approach constitutional questions as a strict constructionist. Judge Souter said:

> My approach to interpretation is not a specific intent approach. The approach has got to take into consideration the text of the provisions in question and * * * the meaning of that text is not to be confined by reference simply to the specific applications that may have been, as it were, in the mind either individually or institutionally of the people who proposed the amendment * * *. [W]hen we look for the original meaning, we are looking for meaning and for principle. We are not confining ourselves simply to immediately intended application. (Transcript, Sept. 17, at 31.)

Judge Souter recognizes that the Equal Protection Clause was properly applied in the landmark case of *Brown* v. *Board of Education,* 347 U.S. 483 (1954):

> If you were to confine the Equal Protection Clause only to those subjects which its framers and adopters intended it to apply to, it could not have been applied to school desegregation * * *. The reason *Brown* was correctly decided is not because they intended to apply the Equal Protection Clause to school desegregation, but because they did not confine the Equal Protection Clause to those specific or a specifically enumerated list of applications, the Equal Protection Clause is, by its very terms, a clause of general application. (Transcript, Sept. 13, at 214-15.)

He also acknowledged that the Constitution protects unenumerated rights:

> It seems clear to me that the concept of liberty is not limited by the specific subjects which the incorporation doctrine by bringing, as it were, the entire corpus of the stated Bill of Rights into the concept of the Liberty Clause [includes]. Liberty is not so limited. (Transcript, Sept. 14, at 9.)

Finally, Judge Souter acknowledged that changing social attitudes and traditions must be considered in identifying such rights. As the Chairman explains in his views:

> A core question is whether, in examining this nation's history and tradition, the Court will protect only those interests supported by a specific and longlasting tradition, or whether the Court will not so constrict its analysis.
>
> In footnote six in *Michael H.* [v. *Gerald D.,* 109 S. Ct. 2333 (1989)], Justice Scalia, joined only by Chief Justice Rehnquist, proposed a methodology for identifying liberty interests based on "the most specific level at which a relevant tradition protecting, or denying protection to, the asserted right can be identified." (109 S. Ct. at 2344.)

In response to a question from the Chairman, Judge Souter said:

> I could not accept the view that, as a rule always to be applied, the most specific evidence is the only valid evidence. * * * [I]t seems to me that the quest for the kind of evidence that we are after should be a quest not for evidence which, as a matter of definition or a matter of absolute necessity has either got to be of narrow compass or of general compass, rather, it has got to be a quest for reliable evidence, and there may be reliable evidence of great generality. (Transcript, Sept. 14, at 160).

My decision to consent to Judge Souter's nomination was a difficult one. I, like other members of this Committee, did not get all of the response to which I believe the Senate is entitled—either in content or in breadth.

I remain troubled by Judge Souter's reticence in answering questions on the scope of fundamental privacy rights. In response to my question about whether *Roe* v. *Wade,* 410 U.S. 113 (1973), is settled law, Judge Souter declined to respond, saying he drew "a fine line" at *Griswold* v. *Connecticut,* 381 U.S. 479 (1965):

> Senator LEAHY. [T]o whatever degree you consider privacy in *Griswold* settled—to whatever extent that is—you don't have in your own mind the same sense of settlement on *Roe* v. *Wade.* Is that correct?
>
> Judge SOUTER. Well, with respect, sir, I think that is a question that I should not answer because I think to get into that kind of a comparison is to start down the road on an analysis of one of the strands of thought upon which the *Roe* v. *Wade* decision either would or would not stand. So, with respect, I will ask not to be asked to answer that.
>
> Senator LEAHY. But you don't feel the same compunction against answering the question * * * regarding *Griswold*?
>
> Judge SOUTER. Well, I have drawn a fine line on *Griswold.* I have said that I believe there is, in fact, a marital right to privacy which is at the core of any privacy doctrine. I have not endorsed the *Griswold* decision as such. It is a fine line to draw, Senator. (Transcript, Sept. 17, at 111-112.)

In my view, that line was the wrong line. Although we do not expect a judicial nominee to comment on a specific case before the court, the public we represent should know how the nominee regards fundamental rights. The right to privacy is a fundamental liberty. See *Thornburgh* v. *American College of Obstetricians and Gynecologists,* 476 U.S. 747 (1986); *Planned Parenthood Ass'n* v. *Ashcroft,* 462 U.S. 476 (1983); *Akron* v. *Akron Center for Reproductive Health, Inc.,* 462 U.S. 416 (1983); *Bellotti* v. *Baird,* 443 U.S. 622 (1979); *Colautti* v. *Franklin,* 439 U.S. 370 (1979); *Planned Parenthood* v. *Danforth,* 428 U.S. 52 (1976); *Roe* v. *Wade,* 410 U.S. 113 (1973); *Eisenstadt* v. *Baird,* 405 U.S. 438 (1972); *Loving* v. *Virginia,* 388U.S. 1 (1967); *Griswold* v. *Connecticut,* 381 U.S. 479 (1965); *Skinner* v. *Oklahoma,* 316 U.S. 535 (1942); *Pierce* v. *Society of Sisters,* 268 U.S. 510 (1925).

While he refused to comment on *Roe* v. *Wade,* Judge Souter assured us that he would not approach challenges to this important case with any agenda or preconceived ideas about the results:

> I have not got any agenda on what should be done with *Roe* v. *Wade,* if that case were brought before me. I will listen to both sides of that case. I have not made up my mind and I do not go on the Court saying I must go one way or I must go another way. (Transcript, Sept. 14, at 128.)

The majority of Americans expect that David Souter will share their view that decisions about reproduction are best left to the individual. This one realm of life where the state has little interest or right to interfere.

During the hearing, Judge Souter spoke movingly about an incident in which he counseled a young woman who was contemplating a self-induced abortion. I hope Judge Souter learned that day that while abortion decisions are traumatic under any circumstances, abortions in the pre-*Roe* era were dangerous, beyond the means of most women, and often life-threatening. American women cannot be plunged into those dark ages ever again.

I wish there would never be the need for another abortion, but that is a decision for a woman, not for a legislature or a court. During the hearing, I reminded Judge Souter of my own experience with illegal, pre-*Roe* abortion. As a prosecutor in Vermont, I received a call from the police. It was the middle of the night and a woman in the emergency room of the local hospital had nearly died from a botched abortion.

I prosecuted the man who arranged for this and other women to travel from Burlington, Vermont to Montreal for abortions performed by a nurse who learned her trade from the SS at Auschwitz. This nurse's botched abortion nearly killed a young woman, who although she did not die, ended up sterile. Unfortunately, this woman was not the only victim.

Abortion is not an easy question, but none of us wants women to endure this pain and exploitation again. Let us be realistic—if abortion is outlawed, women will retreat to back alleys and back rooms where they will be vulnerable to the kind of person I prosecuted in Vermont.

Judge Souter and I discussed this incident during the hearing. I hope he will not forget its message.

I questioned Judge Souter extensively about his views on the Establishment Clause of the First Amendment and remain troubled that he would not commit himself to Jefferson's idea of "a wall of separation between Church and State." (16 *The Writings of Thomas Jefferson* 288 (Washington Library ed., 1904)).

As the Chairman indicates in his views, Judge Souter did suggest that the Court's current interpretation of the Establishment Clause raises difficult issues. In *Lemon* v. *Kurtzman,* 403 U.S. 602 (1971), the Court articulated a three-part test for determining whether a government statute or action violates the Establishment Clause:

> First, the statute must have a secular legislative purpose; second its principle or primary effect must be one

> that neither advances nor inhibits religion * * * finally, the statute must not foster "an excessive government entanglement with religion."

Judge Souter specifically noted that under this standard, the Free Exercise and Establishment Clauses might come into conflict. (Transcript, Sept. 17, at 43-47.)

As the Chairman points out, Judge Soluter did not repudiate the *Lemon* test. Moreover, his objections to that standard were prompted more by concern about whether it is a workable test than by a substantive desire to aid or inhibit religious practice.

I asked Judge Souter about the school of thought that says the Establishment Clause was originally intended to have a very narrow scope which only prevented the literal establishment of a State religion or prevented Government from favoring one Christian sect over another. (See *Wallace* v. *Jaffree,* 472 U.S. 38 (1985) (Rehnquist, J., dissenting)). The same school of thought says that we should not require Government neutrality on religious matters that Government action should be permitted as long as it does not tend to create a State religion or coerce people into accepting a specific view. (*County of Allegheny* v. *American Civil Liberties Union,* 109 S.Ct. 3086 (1989) (Kennedy, J., dissenting)).

Judge Souter responded that he did "not approach the Court with any inclination or agenda" to change the law in this fashion. (Transcript, Sept. 17, at 105.) He added, "I will listen to that argument if it is made before me and I will listen respectfully as I would to any argument that is made before me." (Transcript, Sept. 17, at 105.)

I am concerned that Judge Souter would not reject Justice Kennedy's narrow interpretation of the Establishment Clause. That constricted view would erode the barriers between church and state that the American people have come to rely upon.

I trust that if Judge Souter is confirmed and called upon to consider the Establishment Clause, he will keep in mind our discussion of the poignant experiences of his friends Warren Rudman and Tom Rath or the similar experience that my friend from Vermont, Jerry Diamond, described in his appearance before the Committee.

I trust Judge Souter will understand that government has no business flying flags at half-mast on Good Friday (*see* Complaint in *Brown* v. *Thomson,* No. 78-92 (D.N.H. filed March 20, 1978)), and will recognize that the moral and religious beliefs of Americans, even small minorities, must not be disparaged by the state as mere "whimsy." (see *Wooley* v. *Maynard,* No. 75-1453, Appellants' Jurisdictional Statement in U.S. Supreme Court.)

The First Amendment has made this nation tolerant, united and strong. I do not believe that Judge Souter will view this legacy lightly.

I questioned Judge Souter, as well, about his role as New Hampshire Attorney General when 1414 protesters were arrested at the site of the Seabrook nuclear power plant in 1977. I was concerned with the state's establishment of a private fund to help finance its costs and even more alarmed that the utility donated $74,000 to the Fund, while the prosecutions were pending. It evoked "rent-a-prosecutor" images:

> Senator **Leahy**. [A]s a former prosecutor, I get very concerned if prosecutors do anything that appears that they are in a position of not being impartial when they bring charges, or when they decide they will drop charges, or carry the charges on, or what they might seek for sentences.
>
> You were very active in the prosecution * * *. My concern is that if a private company was paying for part of the prosecution * * * does that private company become your client rather than the people of New Hampshire?
>
> Judge **Souter**. Well, that private company did not become my client. The difficulty that has to be faced is there is a question raised. Hence * * * the appearance of justice is an independent value in its own right. (Transcript, Sept. 17, at 99–100.)

As the chief law enforcement officer in charge of the prosecutions, Attorney General Souter should have prevented an interested party from influencing the judicial process. I welcome Judge Souter's remarks that he now understands he should have opposed the Fund.

Conclusion

Judge Souter did not answer all of my questions, but he did demonstrate a belief in the Constitution and a willingness to approach issues fairly. He is not an idealogue. Most importantly, David Souter testified that as a judge he learned that every decision he makes has an impact on an individual. That is a valuable lesson.

If the majority of the Senate joins us in offering our consent to the president's nominee, Judge Souter will be entrusted with awesome responsibility. As a Supreme Court Justice, David Souter will serve as the guardian of the liberty and cherished freedoms of all Americans. It is for that reason that our constituents have the right to expect fair and thorough questioning of any nominee.

Through us, the American people are bestowing their faith in Judge Souter's ability to preserve the essence of the American tradition. My consent to this nomination represents my faith that he is a nominee worthy of that trust.

ADDITIONAL VIEWS OF MESSRS. THURMOND, SIMPSON, GRASSLEY, AND HUMPHREY REGARDING THE NOMINATION OF JUDGE DAVID H. SOUTER, TO BE AN ASSOCIATE JUSTICE OF THE UNITED STATES SUPREME COURT

On July 25, 1990, President Bush nominated Judge David H. Souter, who currently serves on the United States Court of Appeals for the First Circuit, to be an Associate Justice of the United States Supreme Court. Following the nomination, the Senate Judiciary Committee engaged in an extensive investigation of Judge Souter's personal background and suitability for a position on the Nation's highest court, the Supreme Court. The results of the investigation demonstrate that Judge Souter is eminently qualified to be an Associate Justice of the Supreme Court.

Judge Souter's professional experience has been varied and extensive. In 1968, he left the private practice of law to begin what has proven to be a remarkable career of public service. Judge Souter served for ten years in the Office of the Attorney General of the State of New Hampshire; from 1976 to 1978 he was Attorney General of that State. In 1978 he was appointed to the New Hampshire State bench, serving until 1983 as a trial judge and from 1983 to 1990 as a justice of the New Hampshire Supreme Court. Prior to his nomination, Judge Souter had been selected by President Bush on January 24, 1990, and confirmed by the United States Senate on April 27, 1990, for his current position as a judge on the United States Court of Appeals for the First Circuit.

Judge Souter earned the American Bar Association's highest rating of "well qualified" for both his appointment to the First Circuit and his nomination to the United States Supreme Court.

Judge Souter's vast experience in the New Hampshire Attorney General's office, trial court and appellate court provided him extensive exposure to matters affecting every aspect of Americans' lives. Judge Souter's record demonstrates both his professional acumen and personal integrity. The American Bar Association, which testified before the Committee, rendered a report which indicated that lawyers who appeared before him during his judicial tenure repeatedly described Judge Souter as "'very honorable and fair.'" The President of the New Hampshire Bar Association, John Broderick, testified that "(t)hose of us who have witnessed Judge Souter's judicial performance first-hand can, in good conscience, report to this committee that he possessess * * * a first-rate legal mind, a flexible and curious appetite for the law, an unbiased ear for argument, an uncommon civility and * * * a quiet compassion."

In addition to Judge Souter's vast judicial experience, he will bring to the court an abiding commitment to the rule of law. Judge Souter's record illustrates that he believes that judges ought to interpret the law as written, and not impose their own values in an attempt to reshape society. He applauds the importance of judicial restraint in our system of government. Moreover, he has a keen understanding of the importance of effective criminal law enforcement.

Finally, Judge Souter, during the Judiciary Committee hearings, has shown that he will be a good listener who will consider both sides to a dispute and render a fair and just decision based on the facts of the case and the law. We are convinced that Judge Souter possesses the proper judicial temperament and the ability to listen.

JUDICIAL RESTRAINT

Judicial restraint is a cornerstone of our constitutional system. As Justice Cardozo said, a judge "is not a knight errant, roaming at will in pursuit of his own ideal of beauty or of goodness." Rather, he is a servant of the people who must apply the law as their representatives have enacted it. When judges go beyond this limited role, even with the best of intentions, they usurp the functions assigned to the political branches of government and weaken their own legitimacy.

In his testimony before the Senate Judiciary Committee, Judge Souter acknowledged the importance of judicial restraint. Also, he recognized the dangers of judicial "knight errancy." In giving his views on the proper role of judges, he stated: "(We must) guard against simply imposing our views of morality or public policy, however passionately we may hold them or however profound our principle(s) may be. We have not been placed upon courts, in effect, to impose our will." Judge Souter testified that a judge "has got to guard constantly against substituting his values for the values which he is sworn to uphold." Judge Souter's testimony indicates that he will not arrogate to himself the power to make the law, but rather will leave it where it belongs—in the hands of the elected representatives of the people.

One additional point is in order on the issue of judicial restraint. During the hearings on Judge Souter, there was a discussion of a so called "vacuum theory." The "vacuum" is said to exist when the legislative branch fails to act to resolve a particular issue. Some have suggested that it may be appropriate for the judicial branch to undertake to resolve a particular matter due to inaction by a legislative body. We believe that such action by the judicial branch would be inappropriate as a usurpation of legislative responsibility. Failure of the legislative branch to act does not give the judicial branch the authority to expand its power beyond that framework put in place by our Constitution. The judicial branch should interpret the law and not undertake legislative prerogatives simply because a so-called "vacuum" exists due to legislative inaction. We are satisfied that Judge Souter understands the distinctions between the three branches of government and the limitation on usurpation of authority by the judicial branch.

CRIMINAL LAW

Judge Souter's respect for the law and judicial restraint is demonstrated by his approach in criminal law cases. Judge Souter's opinions clearly show that he balances the rights of criminal defendants with society's vital interest in seeing criminals apprehended and punished. He has resisted undue expansion of procedural protections for criminal defendants while recognizing the practical oversight role of the courts in the criminal justice system. Several representatives of the law enforcement community testified in support of Judge Souter's nomination at his confirmation hearing. Mr. Dewey Stokes, National President of the Fraternal Order of Police, testified that "Judge Souter has demonstrated an appreciation for the application of the black letter of the law to fact patterns and situations faced daily by the police officers of this country in the course of discharging their sworn duties that do not always lend themselves to tidy, legalistic conclusions."

The best example of Judge Souter's law and order approach is his opinion in *State* v. *Koppel,* 127 N.H. 286, 499 A. 2d 977 (1985). In *Koppel,* Judge Souter dissented from a decision of the New Hampshire Supreme Court that declared sobriety checkpoints to be unconstitutional under the New Hampshire Constitution. Judge Souter dissented from the majority decision believing that such checkpoints were reasonable and effective in apprehending drunken drivers, while involving only a minimal intrusion upon motorists. Judge Souter concluded that the public benefit derived from checkpoints far outweighed any disadvantage to drivers. His dissent in *Koppel* displayed a pragmatic, common-sense approach to law enforcement that will serve him well on the Court. It is worthwhile to note that, just last term, the United States Supreme Court upheld sobriety checkpoints in *Michigan Department of State Poilice* v. *Sitz,* 110 S. Ct. 2481 (1990)

FAIRNESS

The most imporant attribute for a Supreme Court Justice to possess is fairness. A Supreme Court Justice must keep an open mind on issues of constitutional law, give an impartial hearing to both sides of a case, and be receptive to all reasonable arguments. No nominee should have a fixed agenda that he or she would pursue once on the Court. It is improper to force judicial nomines to make commitments as to how they would resolve controversial legal questions which may come before the Court.

We were greatly impressed during Judge Souter's testimony before the Judiciary Committee by his keen intellect, sense of fairness, and willingness to listen. He spoke eloquently of the tremendous responsibilities of judges whose rulings will inevitably affect the lives of other people: "We had better use every power of our minds and our hearts and our beings," he said, "to get those rulings right." Judge Souter expressed genuine concerns for those groups in society that have suffered discrimination at the the hands of the majority. His testimony assures us that he will carefully consider all arguments and decide cases on the basis of the law. We believe that this is the highest obligation of a Supreme Court Justice.

PRESUMPTION IN FAVOR OF THE NOMINEE

We are compelled to reject the standards for confirming Supreme Court nominees as set forth in the Additional Views of Senator Biden.

Specifically, we disagree with the notion that the President's Supreme Court nominees must satisfy a rigid "burden of proof" standard. Such an approach to Supreme Court nominations—or any nomination—is unprecented and contrary to the political traditions of this Nation. Heretofore, the President's Supreme Court nominee's have been accorded a presumption of fitness as a matter of basic comity and respect for his role in the selection of a nominee.

Black's Law Dictionary defines "Burden of proof" as "The necessity or duty of affirmatively proving a fact or facts in dispute on an issue raised between parties in a cause."

The "burden of proof" standard presumes that the confirmation process is an adversary proceeding, pitting the president and his or her nominee against the members of the United States Senate. It is incompatible with prior precedent and comity that has traditionally governed the confirmation process.

The "advise and consent" role assigned to the Senate with respect to Presidential nominations was not intended to create an atmosphere of conflict in which to examine nominees. Rather, Senators were afforded the opportunity to exercise their own judgment in determining the suitability of a nominee for the Nation's highest court.

Another concern with this new "burden of proof" approach was noted that the confirmation hearing by former Attorney General Griffin Bell. Judge Bell observed that such an approach could result in an nominee taking "a poll to find out what everyone is thinking," and coming to his or her confirmation hearing to make a statement taking solid positions on several important issues which bear directly on matters he or she will have to decide as a justice. We agree with Judge Bell's belief that "putting the burden of proof in the nominee would * * * be a dangerous approach."

Therefore, we do not adhere to the "burden of proof" standard and believe that it is inappropriate to apply such a standard to Supreme Court nominees in the future.

DETAILED DISCUSSION

The Committee's hearings on the nomination of Judge David H. Souter to be an Associate Justice of the Supreme Court of the United States confirmed that he is eminently qualified to serve on the Nation's highest court. Judge Souter demonstrated throughout the hearings that he is, as the President described him, a jurist of exceptional intellect and sound judgment, a man of unquestioned integrity and commendable judicial temperament. His testimony before this Committee has been aptly described as a tour de force, a remarkable demonstration of intellect and an impressive display of judicial temperament.

Judge Souter's life has been committed to, and inspired by, the law. He has shown himself to be a man with whom we may confidently entrust the law. He will be, we are convinced, a Justice of whom the Nation can be proud.

No one who listened to Judge Souter's testimony over the course of the three days of intensive questioning by this Committee, or who observed his demeanor during the hearings, could doubt that

President Bush faithfully discharged his duty to nominate a candidate worthy of a seat on the Nation's supreme tribunal. We believe that it is now incumbent upon the Senate of the United States to faithfully discharge its duty by speedily confirming Judge Souter. The Senate Judiciary Committee has taken the important first step toward fulfilling this responsibility by its overwhelming approval of the nomination.

There has never been—nor could there be—any question as to Judge Souter's intellectual ability to serve with distinction on the Supreme Court. He is gifted with an incisive, probing mind. His testimony revealed a mastery of Supreme Court decisions and an ability to grasp the nuance and the potential implications of those decisions in widely varying circumstances. He discussed his views with the Committee on even the most complex constitutional issues with pristine clarity.

Judge Souter similarly left no doubt that he is equally qualified in terms of judicial temperament and integrity to serve on the highest court. During three strenuous days of testimony, he showed an enormous capacity to listen carefully and to respond succinctly and candidly to even the most penetrating and difficult questions propounded by the Committee. Not once did we see impatience, rancor, or disrespect, regardless of the nature of the question or the manner in which it was posed. As Senator Thurmond noted at the close of Judge Souter's testimony,

> I want to commend you for your demeanor in this hearing. You have appeared humble, and you have appeared courteous * * *.
>
> You have brought out the fact that you will listen on the Supreme Court. I do not know whether I have ever heard a Supreme Court Justice say that before, but I like that expression: I will listen. You will listen. That is important. People cannot listen when they are talking. They learn by listening.
>
> The very fact that you will be a good listener, I think, is a very fine symbol here of what you stand for. (Tr., 9/17/90, at 268.)

He also proved himself to be a man of unquestioned integrity and honesty. Indeed, the Committee's investigation established that his life has been exemplary, as should be that of any nominee to the Supreme Court.

Apart from possessing these essential attributes of intellect, temperament and integrity, the record that the Committee complied on Judge Souter and analyzed establishes that Judge Souter has well-developed views on the issues that today and in the future will confront our judiciary, and therefore were of primary concern to the Committee. And he has a working knowledge of the authorities and principles that will inform the decisions on these issues.

Judge Souter relies upon the test and original meaning of the Constitution and statutes in interpreting their meaning. He has a clear conception of the proper role of courts in our society. He thus appreciates that he must not substitute his own personal views for those of the framers of our Constitution and the drafters of our laws. And he has a profound respect for precedent and the values underlying our commitment to the principle of stare decisis. We applaud these views on the proper role of the judiciary, state or federal.

Judge Souter also demonstrated to this Committee a keen understanding of our federal system and its respect for the states as laboratories of experiment, and of the fundamental separation of powers of the coordinate branches of our federal government which, as he correctly noted, is the bedrock of our constitutional liberties.

His public service has sensitized him to the problem of crime in our society. He is tough on crime, and has a genuine concern for the rights and frustrations of the victims of crime. At the same time, Judge Souter has an abiding respect for the rights of criminal defendants. He shows no reluctance to reverse a conviction when the constitutionally mandated protections accorded a defendant have been violated.

Finally, Judge Souter's testimony on issues of race and gender was compelling and reassuring that Judge Souter will protect the rights of all. He told this Committee that he believes that the most important change needed in this country is the eradication of discrimination in all forms, whether based on race, ethnicity or gender.

Judge Souter is unquestionably a man who cares deeply about the problems facing this country, and is committed to do all he can within the law and within the appropriate scope of judicial power to help solve them.

On these grounds, and for the reasons set forth in greater detail below, we conclude that Judge Souter is eminently qualified to serve as an Associate Justice of the Supreme Court of the United States.

Judge Souter

PART ONE: BACKGROUND AND QUALIFICATIONS

The Senate received the President's nomination of Judge David Hackett Souter to be an Associate Justice of the Supreme Court of the United States on July 25, 1990. The hearings on Judge Souter's nomination were held on September 13-14 and 17-19, and the Committee heard testimony from a large number of witnesses. The nominee testified for three days.

Judge Souter was born on September 17, 1939 at Melrose, Massachusetts. He attended Harvard College from 1957 to 1961 where he was elected to Phi Beta Kappa and graduated magna cum laude with a Bachelor of Arts degree. From 1961 to 1963 Judge Souter attended Magdalen College at Oxford University on a Rhodes Scholarship. He received both a B.A. and M.A. from Oxford. Upon his return to the United States, he enrolled at Harvard Law School from which he received an LL.B. degree in 1966.

From 1966 to 1968, the nominee engaged in the private practice of law with the Concord, New Hampshire law firm of Orr & Reno.

In 1968, Judge Souter joined the Office of the Attorney General of the State of New Hampshire as an Assistant Attorney General. He was promoted to Deputy Attorney General in 1971, and was appointed Attorney General of New Hampshire by the Governor in 1976.

In 1978, he was appointed by the Governor to the New Hampshire Superior Court, the State's trial court of general jurisdiction. The Governor of New Hampshire appointed Judge Souter to the State's Supreme Court in 1983, a position in which he served until this year.

President Bush nominated Judge Souter to be a judge on the United States Court of Appeals for the First Circuit in January 1990 and he was confirmed by the Senate in April 1990. He has served on that court since then.

In considering Judge Souter's nomination for the Supreme Court, the American Bar Association's (ABA) Standing Committee on the Federal Judiciary, chaired by Ralph I. Lancaster, Esq., unanimously found Judge Souter to be "Well Qualified," its highest rating. Based on its extensive investigation, the Standing Committee found that Judge Souter's "integrity, character and general reputation appear to be of the highest order and without blemish." (Letter from Mr. Lancaster to Chairman Biden, September 14, 1990, at 3.) The Standing Committee determined that Judge Souter's judicial temperament and professional competence appear to "meet the high standards of this Committee's definition." (Id.) The committee's letter to Chairman Biden concluded that "Judge Souter is highly competent and possesses the scholarly, analytical and writing skills necessary to serve successfully on the Supreme Court of the United States." (Id. at 5.)

The significance of the ABA's highest rating for this nominee is underscored by the broad scope of the investigation conducted by the Standing Committee. The Committee interviewed judges and lawyers throughout the United States. Those interviewed included members of the United States Supreme Court, members of the Federal Courts of Appeals and District Courts and members of state courts, including Judge Souter's former colleagues from New Hampshire. Other parties contacted included deans and faculty members of law schools throughout the United States, private practitioners who appeared before Judge Souter when he was on the bench in New Hampshire and his former colleagues in the New Hampshire Attorney General's Office.

In addition to its field investigation, the Standing Committee established three panels of law professors and private attorneys to review all of Judge Souter's more than 200 opinions for the Supreme Court of New Hampshire. All of his New Hampshire Attorney General opinions and many of his Superior Court opinions were also reviewed and evaluated.

Three members of the Standing Committee also interviewed Judge Souter personally.

After this exhaustive investigation, the Standing Committee found Judge Souter entitled to its highest rating for a nominee to the Supreme Court.

The Committee's examination of Judge Souter's background revealed that Judge Souter in fact has a substantial record both as a public official in the executive branch and as a judge. During the ten years he worked in the New Hampshire Attorney General's Office, Judge Souter authored and participated in what by any standard is an impressive number of briefs and legal opinions on a wide variety of legal issues. Judge Souter produced over 4,000 pages of documents to this Committee in response to the Committee's questionnaire. While not all of these records reflect Judge Souter's personal views on the various issues addressed therein because at times he was writing as an advocate, they do provide substantial insight into his extraordinary skills as an advocate, a scholar and a writer.

Of keenest interest are the more than two hundred opinions that Judge Souter authored while on the New Hampshire Supreme Court for seven years and the hundreds of other opinions that he joined while a member of that court. In addition, Judge Souter wrote a number of opinions while he was on the state Superior Court for five years.

PART TWO: JUDGE SOUTER DISPLAYED APPROPRIATE JUDICIAL TEMPERAMENT

Although Judge Souter's testimony and record have made it so clear as to hardly require emphasis, we note how impressed we are by the nominee's judicial temperament. Judge Souter's temperate, measured testimony on many of the most volatile issues of the day was itself ample evidence of his judiciousness and impartiality. His twelve years on the State and federal bench provide even more conclusive evidence that he possesses all the personal and professional characteristics that together cause one to have what we term judicial temperament: understanding, open-mindedness, impartiality, integrity, independence, and courtesy. As Judge Souter said in describing his experiences as a trial judge:

> I saw every sort and condition of the people of my State that a trial court of general jurisdiction is exposed to. I saw litigants in international commercial litigation for millions, and I saw children who were the unwitting victims of domestic disputes and custody fights which somehow seemed to defy any reasonable solution, no matter how hard we worked at it.
>
> I saw * * * the denizens of the criminal justice system * * *. I saw appellants from the juvenile justice system who were appealing their findings of delinquency. And, in fact, I had maybe one of the great experiences of my entire life in seeing week in and week out the members of the trial juries of our States who are rightly called the consciences of our communities * * *.
>
> When those days on the trial court were over, there were two experiences that I took away with me * * * and the lessons remain with me today. The first lesson * * * is that whatever court we are [on] * * * at the end of our task some human being is going to be affected * * * . The second lesson I learned * * * is that if we * * * are going to change * * * lives by what we do, we had better use every power of our minds and our hearts and our beings to get those rulings right. (Tr., 9/13/90, at 98–99.)

The understanding and the empathy evidenced in this statement is the bulwark of judicial temperament.

Moreover, Judge Souter repeatedly demonstrated, both in his testimony and in his record, an insistence upon and respect for fairness, impartiality, and independence that, too, are at the heart of judicial temperament. As he told the Committee.

> [I]f the judicial process is nothing else, it is a process in which in every court and on every issue that may come before a judge the people who come before him can have a fair hearing. A fair hearing means something substantially more than simply judicial courtesy to sit back and let a person say whatever is in that person's mind. A fair hearing requires a willingness of the court not only to listen, but genuinely to examine the position which the court is inclined at that point to take. (Tr., 9/14/90, at 140.)

This willingness to listen, which Senators have found to be one of Judge Souter's most appealing traits, confirms that he does not approach the Court with an agenda that he wishes to pursue, or with a closed mind. In response to a question from Senator Metzenbaum, Judge Souter stated:

> [Y]ou may properly ask, and I hope you will ask yourself, as you and the other members of the committee listen to me over the course of the next few days, you may properly ask whether, on * * * issues generally, I am open enough to listen.
>
> What you want to avoid is a judge who will not listen, and I will ask you when these hearings are over to make a judgment on me as to whether I will listen or not. I think I have a record as a judge which indicates that I will, and after you and the other members of this committee have finished examining it, I will ask you to judge me on that basis. (Tr., 9/13/90, at 186–87.)

We believe that, once on the Supreme Court, Judge Souter's fairness and objectivity will serve him and the country well.

Finally, we note that Judge Souter's record conclusively and irrefutably demonstrates the irreproachable personal and professional integrity required of a judge. It is a remarkable tribute to him that weeks of meticulous review of his record by Senators of both parties, and by outside organizations anxious to raise questions, revealed nothing requiring so much as a question or response during his testimony before the Committee. The Nation will be fortunate to have a justice of such unimpeachable integrity, impartiality, and judicial temperament on our highest court.

PART THREE: JUDGE SOUTER UNDERSTANDS THE PROPER ROLE OF THE COURTS

In our tripartite system of government, the responsibility of the judiciary is to interpret the law, not to make it. Courts can, under the Constitution, only decide those cases that are properly brought before them, and then only if there is a case or controversy. As Judge Souter acknowleged, judges stray from their role when they decide cases according to their own views of public policy rather than according to the dictates of law. When Senator Grassley asked Judge Souter about the potential of judges to act as "knight-errant," roaming over the social landscape to address problems and issues at will, Judge Souter explained that the legitimacy of judges in a democracy rests on their appeal to a law that is outside themselves:

> What we are trying to do to avoid that roving quality, that knight errancy that Justice Cardozo—or Judge Cardozo then—was speaking about, is to try to find an objective source of meaning which constrains us, as well as the rest of the republic, which was intended by the people who drafted and the people who adopted the constitutions and the statutes that we are dealing with, because it is only if we try to search for a source of meaning outside ourselves and our preferences or the preferences that may be fleeting at the moment do we really deserve, as members of a judicial system, the respect and the acceptance which ultimately is the foundation for the rule of law in this republic or in any republic. (Tr., 9/14/90/ at 6.)

That exchange continued:

> Senator GRASSLEY. Judge Souter, a recent nominee to the Supreme Court once said—and I think what this nominee said is fully consistent with the Cardozo passage that I just quoted and you responded to—and I give you this quote: "In a constitutional democracy, the moral content of law must be that of a framer or legislator, never that of the morality of the judge."
>
> Do you share that philosophy of judging?
>
> Judge SOUTER. Yes. I share the demand that we look outside ourselves, the demand that we guard against simply imposing our views of morality or public policy, however passionately we may hold them and however profound our principles may be. We have not been placed upon courts, in effect, to impose our will. We have been placed upon courts to impose the will that lies behind the meaning of those who framed and by their adoption intended to impose the law and the constitutional law of this country upon us all. (Tr., 9/14/90, at 6–7.)

In the nominee's view, therefore, a judge must follow the law, and not his personal views of morality or policy. In recognizing this fundamental limitation on a judge, Judge Souter has demonstrated that he possesses the single most important qualification for service in the judiciary in our system of divided powers.

Judge Souter also discussed the role of the courts in areas where there is pressure for judicial action because of political branch inaction. He explained that the courts must ensure that our constitutional freedoms are protected where the political branches fail to provide that protection:

> Senator GRASSLEY. Judge Souter, those who advocate a greater activist role for the Court say that the broad and spacious terms of the Constitution lend themselves to Court-made solutions when the political branches fail to act.

> What is your sense of this perception that the courts, rather than the elected branches, should take the lead in creating a more just society?
>
> Judge Souter. I think the proper way to approach that is that courts must accept their own responsibility for making a just society. One of the things that is almost a factor of a law of nature, as well as a law of constitutional growth, is that if there is, in fact, a profound social problem if the Constitution speaks to that, and if the other branches of Government do not deal with it, ultimately, it does and must land before the bench of the judiciary.
>
> One of the interesting developments—and I would suggest to you without trying to indicate to you in any way the direction that I think it should go—one of the hopeful developments or the developments that give me hope is the fact that we are living at a point of history right now where there is so much concern expressed in this Committee yesterday and expressed in comment throughout the legal and political community in the legitimate extent of congressional power to act under the Fifth Section of the Fourteenth Amendment.
>
> Because if, in fact, the Congress will face the responsibility that goes with its Fourteenth Amendment power, then by definition, there is, to that extent, not going to be a kind of vacuum of responsibility created, in which the courts are going to be forced to take on problems which sometimes, in the first instance, might better be addressed by the political branches of the Government. (Tr., 9/14/90, at 13-14.)

Judge Souter emphasized, however, that the courts are not super-legislatures, responsible for addressing every social ill or injustice, but rather play the more limited role of protecting those liberties and rights conferred by the Constitution or otherwise retained by the people:

> Senator Grassley. Are you saying the Supreme Court should act because there is a vacuum there, or because there is a cause within the Constitution for the Courts to act; as opposed to because the political branches have not acted?
>
> Judge Souter. The Supreme Court should only act and can only act when it has the judicial responsibility under the Fourteenth Amendment or any other Section of the Constitution. But the Supreme Court is left to act alone when the political branches do not act beforehand. (Tr., 9/14/90, at 14-15.)

Judge Souter thus believes that courts may act only when they are empowered to do so, and not simply when they perceive that a social problem has gone unaddressed or unremedied. This principle of restraint is a cornerstone of our constitutional system. It is the defining characteristic of the judiciary in our government of divided powers. We are encouraged by the nominee's view of the properly limited role of the federal courts.

A. Judge Souter appreciates the importance of separation of powers to our form of government

The Committee questioned Judge Souter on several issues relating to the proper role of the executive, legislative and judicial branches under our Constitution. Responding to a question by Senator Thurmond, Judge Souter highlighted his commitment to the constitutional principle of separate powers.

> I would look [among other things,] to the concept implicit in [the Constitution] and as a basis of the bedrock of the structural sense of American constitutionalism that power is divided and that that division of power even granted, is a division of power which must be protected if the entire government is to remain in the place that it was intended to have.
>
> * * * * *
>
> I think the reasons then for the remarkable and blessed endurance of the American Constitution are extraordinarily pragmatic reasons. It rests upon a recognition of where its power comes from and it is structured with a recognition that power will be abused unless it is limited and divided and restrained. (Tr., 9/13/90, at 121–22.)

Judge Souter's remarks gave us confidence that he will remain faithful to the Constitution, our constitutional history and the limits of judicial authority. We note that his remarks also show deep appreciation of the American principle that limited government is the hallmark of a free people.

B. Judge Souter fully appreciates the importance of federalism to constitutional interpretation and the structure of our government

No constitutional principle was of greater moment to the Framers of the Constitution and the Bill of Rights than the principle of federalism, which they believed would provide the most important single guarantee of civil liberties. The principles that the federal government is a government only of enumerated powers and that the States possess coordinate and independent authority over critically important spheres of public responsibility are fundamental to our constitutional order. Judge Souter's career and testimony suggest an understanding of the importance to our liberties and to the continued development of our form of government of what Justice Brandeis referred to as "the laboratory of the States."

As a State law enforcement official and State court judge for over two decades, Judge Souter knows from personal experience the central role that the Constitution gives the States, and the role of federalism in the separation of powers undergirding civil liberties. As the State's legal representative, Judge Souter vigorously defended the State's prerogatives against federal intrusion on a number of occasions, such as the federal government's mistaken assertion of sovereignty over Lake Winnepasaukee. He also gained firsthand experience of the difficulties that the Supreme Court's expansive criminal rights jurisprudence created for State law enforcement agencies. Later, as a State court trial and appellate judge, he showed a thorough understanding of the important and distinct roles played by both the State and the Federal Constitutions in protecting the liberties of the citizen.

In his testimony before the Committee, Judge Souter also showed his appreciation of the importance of our dual system of government in protecting civil liberties:

> Senator THURMOND. Would you please share with the Committee your opinion as to the success of our Constitution and its distinction as the oldest existing constitution in the world today.
>
> Judge SOUTER. * * * I would look [among other things,] to the concept implicit in [the Constitution] * * * that power is divided and that that division of power * * * must be protected * * *.
>
> That structural sense of the division of power encompasses not only what we speak of as the separation of powers doctrine within the national government, itself, but the concept of the distribution of power in a Federal system. (Tr., 9/13/90, at 121–22.)

At the same time, he recognizes that the States are in part responsible for the trend towards increased federal power:

> Judge SOUTER. [T]he explanation for [the] erosion [of the States' authority] began with the fact that there were problems to be solved which the States simply would not address and [which] the people wanted * * * addressed[,] and therefore the people looked to Washington. (Tr., 9/13/90, at 123.)

Similarly, Judge Souter has recognized that the expansion of the federal government's authority to regulate interstate commerce and the passage of the Fourteenth Amendment have both affected the respective spheres of responsibility of the federal government and the States:

> At the very least, two developments in our constitutional history have necessarily changed the significance of the Tenth Amendment for us.
>
> The first * * * is the concept of the commerce power[,] which I think * * * has grown to a, and has been recognized as having a plenary degree which would probably have astonished the Founders.
>
> The second development which has got to be borne in mind in coming to any approach to the Tenth Amendment is simply the Fourteenth. There was, very expressly, authority given to the national Government through the Fourteenth Amendment, which again, was inconceivable to the Framers of the Tenth. (Tr., 9/13/90, at 124.)

Judge Souter appropriately reserved his position on the controversial question whether the Tenth Amendment imposes substantive limitations on the authority of Congress to legislate in matters affecting the primary responsibilities of the States. (Tr., 9/13/90, at 122–26). *Cf. National League of Cities* v. *Usery,* 426 U.S. 883 (1976);

Garcia v. *San Antonio Metropolitan Transit Authority,* 469 U.S. 528 (1985).

We appreciate and endorse Judge Souter's approach to the vital constitutional principle of federalism. His approach to this area reflects an appreciation both of the important powers delegated to the central government by the Commerce Clause and the Fourteenth Amendment and of the imperative of maintaining the coordinate system of government ordained by the Framers of the Constitution to protect the liberties of the American people.

PART FOUR: JUDGE SOUTER'S JUDICIAL PHILOSOPHY APPROPRIATELY RELIES ON THE TEXT AND ORIGINAL MEANING OF THE CONSTITUTION AND STATUTES

Judge Souter's approach to the task of judging was the matter of greatest importance to the Committee. Judge Souter characterized his approach to decision making as a search for "original meaning." Judge Souter believes that judges must decide cases according to principles of law, not their own personal predilections or preferences. For example, in response to questioning from Senator Grassley, Judge Souter said "it is essential for us to have some idea of the criterion that we are going to employ to find values which are not simply reflections of our own feelings at the moment and our own feelings about the desirability of the claims that may be pressed before us." (Tr., 9/14/90, at 17.)

Judge Souter also properly recognizes that a judge must always be on his guard lest he substitute his own views for those of the Framers of the Constitution or the Congress of the United States. Judge Souter's colloquy with Senator Grassley on this point is especially revealing and, we would add, reassuring:

> We have not been placed upon courts * * * to impose our will. We have been placed upon courts to impose the will that lies behind the meaning of those who framed and by their adoption intended to impose the law and the constitutional law of this country upon us all.
>
> Senator GRASSLEY. So when it comes to a judge's own values and beliefs, there is little or no room for those in this constitutional interpretation?
>
> Judge SOUTER. He has got to guard constantly against substituting his values for the values which he is sworn to uphold. (Tr., 9/14/90, at 7.)

Judge Souter's account of the correctness of *Brown* v. *Board of Education* as an original matter is one widely shared by practitioners of the original meaning approach. He explained that the Equal Protection Clause, in requiring that every State give every person the equal protection of the laws, defines a general principle of racial equality. That principle, according to Judge Souter, was inconsistent with segregated public schools when the amendment was adopted in 1868 and when *Brown* was decided in 1954. As Judge Souter said, "I would like to think, and I do believe, that the principle of equal protection was there and that in the time intervening we have gotten better at seeing what is before our noses." (Tr., 9/17/90, at 197.)

We also respectfully disagree with the suggestion in Senator Biden's Additional Views that there is some inconsistency, or at least a tension, between Judge Souter's approach to *Brown* and his dissent in *Estate of Dionee,* in which he maintained that the New Hampshire Constitution's ban on the sale of justice referred to bribery, not user fees for judicial services. In *Dionne,* Judge Souter relied on historical evidence—in that instance reaching back to Magna Carta—in order to understand the meaning of a constitutional provision that descended from Magna Carta. As Judge Souter explained to this Committee, the principle contained in the New Hampshire Constitution was in his view a fairly narrow one. He therefore believed that the New Hampshire Supreme Court had no power to broaden it, replacing the Constitution's principle with its own. Whatever the historical merits of Judge Souter's explication of the text in that case, we must agree with him that the court's responsibility was to apply the original principle.

PART FIVE: JUDGE SOUTER DEMONSTRATED AN APPROPRIATE RESPECT FOR PRECEDENT

Judge Souter has an obvious and keen respect for the value of precedent in our judicial system, often referred to as the principle of stare decisis. He described this principle as a "bedrock necessity if we are going to have in our judicial systems anything that can be called 'the rule of law' as opposed simply to random decisions on a case-by-case basis." (Tr., 9/13/90, at 135.)

Judge Souter as a New Hampshire judge joined the majority opinion in two cases that he believed were controlled by precedent.

He is not, however, blindly committed to *all* precedents, regardless how incorrect. If the holding of a case is clearly incorrect, then it is Judge Souter's view that that case is subject to reconsideration. In deciding whether to overrule that case, Judge Souter explained that a court should consider, among other things, whether the public, the courts and the legislatures have relied on this precedent before overruling it. (Id. at 137–38.) As Judge Souter indicated in his dissent in *Appeal of Portsmouth Savings Bank Corporators,* the reliance of the public on a precedent is an important consideration weighing against reversal of that precedent. In his opinions and in his testimony, we believe that Judge Souter has struck an appropriate balance between respect for precedent and the recognition that precedents must sometimes be reconsidered.

PART SIX: JUDGE SOUTER RECOGNIZES A RIGHT OF PRIVACY PROTECTED BY THE CONSTITUTION

We were equally impressed with Judge Souter's responses to questions of substantive law that were of most interest to the Committee during the hearings. While we do not believe that a nominee's responses to questions of this sort should be determinative of the Committee's decision to recommend confirmation, we discuss these issues because of their importance to other members of the Committee.

Judge Souter testified that he believes that there is a fundamental right to marital privacy. In defining that right, he acknowledged that the right of a married couple to procreate is at the "fundamental heart" of the right to marital privacy. (Tr., 9/13/90, at 116.) He further acknowledged that "there is a core set of family values which, in the general understanding and the traditional understanding of the American people, are protected." (Tr., 9/14/90, at 108.) We share his abiding respect for these values, which are unmistakably an essential part of the fabric of our society.

At the same time, in stating his views with respect to a more generalized right to privacy as well as unenumerated rights generally, Judge Souter demonstrated his adherence to principles of judicial restraint. In response to questioning by Senator Grassley, Judge Souter described the process by which a judge must evaluate a claim that any form of conduct is protected under the Constitution as a fundamental right. He described the "difficulty of finding a disciplined process for giving content to what we call the unenumerated rights" and said that "it is essential for us to have some idea of the criterion that we are going to employ to find values which are not simply reflections of our own feelings at the moment and our own feelings about the desirability of the claims that may be pressed before us." (Tr., 9/14/90, at 8-9, 17.) In these comments is a recognition of the profound difficulty in identifying those rights which are so fundamental as to be accorded special protection.

The Additional Views describe as "worrisome" Judge Souter's refusal to commit himself on the issue of whether unmarried persons have a fundamental privacy right to use contraceptives, suggesting that this is a settled question under Supreme Court case law. We disagree. The Supreme Court held in *Eisenstadt* v. *Baird*, 405 U.S. 438 (1972), that unmarried persons have a right to use contraceptives as a matter of equal protection. It did not hold that they have such a right as a matter of substantive due process. Judge Souter correctly described this as an "open question" (Tr., 9/17/90 at 230), and we believe his respectful declination to answer this particular question was entirely appropriate, in light of pending cases that have implications in this area.

PART SEVEN: JUDGE SOUTER'S POSITIONS ON CIRMINAL LAW ISSUES REFLECT THE CONSTITUTION'S BALANCE BETWEEN THE IMPORTANT RIGHTS ACCORDED TO DEFENDANTS AND SOCIETY'S INTEREST IN THE PUNISHMENT OF CRIME

It is clear to us that Judge Souter is a strong law and order judge, who also is concerned to see that the rights of defendants are protected. He understands that society has a vital interest in seeing criminals apprehended and punished and that the police ought not to be hampered in their vital work by unnecessary procedural impediments. He has resisted the undue expansion of procedural protections for criminal defendants while recognizing the important oversight role of the courts in the criminal justice system. As Senator Hatch observed, Judge Souter's record reveals "a judge who is tough on crime but also fair when it comes to balancing the competing interests of the public and criminal defendants." (Tr., 9/17/90, at 8.)

Judge Souter's views in the criminal law area obviously are influenced both by his considerable experience as a public law enforcement officer and by his deep understanding of the community's interest in combatting crime. He has spent much of his professional life in law enforcement. As a judge, he has consistently upheld the decisions of legislators, prosecutors and police so long as those decisions did not infringe on the fundamental rights of criminal defendants. As Dewey Stokes, National President of the Fraternal Order of Police, testified, "Judge Souter has demonstrated an appreciation for the application of the black letter of the law to face patterns and situations faced daily by the police officers of this country in the course of discharging their sworn duties that do not always lend themselves to tidy, legalistic conclusions." (Tr., 9/19/90, at 130.)

We look forward to having someone with Judge Souter's law enforcement background, and commitment to law enforcement, on the Supreme Court of the United States.

A. Judge Souter recognizes that many landmark criminal procedure decisions rest on pragmatic judgments

Judge Souter's awareness of the practical problems faced by law enforcement officers in enforcing the laws was evidenced at several points during his testimony. Judge Souter emphasized that Supreme Court decisions addressing issues in the area of criminal procedure have been and should be influenced in part by pragmatic considerations. For example, under questioning by Senator Thurmond, Judge Souter noted that certain applications of the exclusionary rule, especially where law enforcement officers have acted in good faith, serve no proper purpose and on that ground might properly be rejected:

> Senator THURMOND. Judge Souter, the Supreme Court recognized a good-faith exception to the exclusionary rule in the case of *U.S.* v. *Leon.* This exception applies only to searches made pursuant to a warrant. Would you discuss the effect of the exclusionary rule and the good-faith exception in preventing police misconduct?
>
> Judge SOUTER. [W]hat the *Leon* case is saying is that if the mistake which leads us to conclude that there has been a Fourth Amendment violation was a mistake not made by the police, but made by the judge or a magistrate who issued the warrant, that should not preclude the introduction of evidence on the theory described in *Mapp* v. *Ohio.* If the mistake is not the police's mistake, then you gain nothing in influencing police conduct by keeping the evidence out.
>
> * * * * *
>
> I think the *Leon* rule is entirely consistent with the rationale for the exclusionary rule as described in *Mapp.* (Tr., 9/14/90, at 167–68.)

Judge Souter also understands the *Miranda* decision as a "pragmatic" decision, designed to produce "a practical means to avoid what seemed to be unduly time-consuming and sometimes intractable problems encountered in the Federal courts in dealing with claims that confessions were inadmissable on grounds of their involuntariness." (Tr., 9/13/90, at 128.) Judge Souter noted that in evaluating the *Miranda* decision today, we must "ask very practical questions about how it actually works." (Tr., 9/13/90, at 129.)

Judge Souter's appreciation for the practical problems confronting law enforcement officers is also apparent in his decisions during his service on the New Hampshire courts. For example, he upheld the use of "pen registers," which aid police in detecting drug traffickers by recording the numbers called from a particular telephone, in the face of arguments that the use of such devices violated the New Hampshire State Constitution. *State* v. *Valenzuela*, 536 A.2d 1252 (N.H. 1987). He also shielded the names of police informants from disclosures that could compromise the effectiveness of criminal investigations. *State* v. *Svoleantopoulos*, 543 A.2d 410 (N.H. 1988); *State* v. *Cote*, 493 A.2d 1170 (N.H. 1985). Finally, on several occasions, he declined to read *Miranda* expansively, refusing to impose requirements on law enforcement officers beyond those contained in the *Miranda* decision itself. *E.g., State* v. *Jones*, 484 A.2d 1070 (N.H. 1984).

Judge Souter's pragmatism was also evident in his comments on the report of The Ad Hoc Committee of the Judicial Conference on Federal Habeas Corpus in Capital Cases, known as the "Powell Committee" after its chairman, Justice Powell. The Powell Committee, convened in June 1988 by the Chief Justice to inquire into "the necessity and desirability of legislation directed toward avoiding delay and lack of finality" in capital cases, proposed legislation that would in essence afford States the option of establishing effective systems for providing indigent capital defendants with competent representation in state collateral proceedings. If a State chose to establish such a system, stronger rules of finality would apply in subsequent federal review. Specifically, the defendant would normally be limited to a single federal habeas corpus petition. Following the affirmance on appeal of the district court's denial of such a petition, and affirmance of the judgment or denial of certiorari by the Supreme Court, further federal review would be barred except on grounds that undermine confidence concerning the defendant's factual guilt of the underlying capital offense for which the sentence had been imposed.

Judge Souter commented on the Powell Committee proposal in response to a question from Senator Thurmond:

> I think there was great wisdom in the recommendation of the Powell committee, because what the Powell committee centered on was not in the first instance a strict rule of limitation, but on the problem which, in fact, was leading to the resort, frequently at the last moment, to the Federal courts in death penalty cases.
>
> * * * * *
>
> What the Powell Commission recommended was that if we are going to place reasonable limits on Federal collateral review, we have got to accept the reality that there has got to be some kind of genuinely significant representation by counsel at the very point collateral review can begin * * *. [I]f counsel can properly be provided at the initial stages, then it is fair and appropriate to place limitations

> upon the time in which collateral review can be sought. (Tr., 9/13/90, at 129–31.)

Judge Souter also endorsed the need for greater finality in habeas corpus review, as recognized by the Supreme Court in *Teague* v. *Lane* and *Penry* v. *Lynaugh*. (Tr., 9/14/90, at 170.) In our view, he is to be commended for his responsible appreciation for both sides of this problem confronting our system of justice.

Judge Souter, in response to a question from Senator Thurmond, also spoke eloquently about the need to recognize victim's rights.

> Senator THURMOND. Judge Souter, I believe that judges should impose tough sentences in criminal cases, especially when the crime committed is one of violence. Society demands tough punishment for violent offenders. In the past, victims of those who committed violent crimes have often played a diminished role in the criminal justice system. However, recently, the number of victims who participate in the prosecution of criminal cases has increased.
>
> In your opinion, should victims play a major role in the criminal justice system? If so, to what extent should a victim participate?
>
> Judge SOUTER. Well, Senator, there are certinly two respects in which victims should be recognized in the system, and there is a further interest of victims which the Government as a whole should recognize. The most obvious role of the victim, of course, is the role which any victim must play in establishing the fact of the crime * * *. The victim also, it seems to me, has a claim to the attention of the court in a criminal case if there is, in fact, a conviction. (Tr., 9/13/90, at 133–34.)

The rights of victims in our views are all too often ignored or neglected in our system, and we believe it speaks volumes about Judge Souter that he understands the plight of the victims of crime in our society.

C. Judge Souter accepts the constitutionality of the death penalty.

As a careful judge, with a proper respect for the Constitution adopted and preserved by the American people, Judge Souter also acknowledges that the death penalty is explicitly recognized in the text of the Constitution. Judge Souter replied in response to a question from Senator Humphrey:

> I recognize that, as a simple matter of the text, the Constitution of the United States recongizes capital punishment.
>
> Senator HUMPHREY. But you do acknowledge that the Constitution comprehends, anticipated capital punishment?
>
> Judge Souter. It does so by express reference. (Tr., 9/17/90, at 129.)

Judge Souter elaborated on this important point under questioning from Senator Specter.

> Senator SPECTER. Do you think it would be a permissible interpretation of the Eighth Amendment prohibition

> against cruel and unusual punishment to say that the provision precludes the death penalty?
>
> Judge SOUTER. I do not think that as a per se kind of rule we can make that assumption, simply because of the recognition within the document itself that capital punishment exists and a recognition which implies the assumption that the drafters accepted it as legitimate. (Tr., 9/17/90, at 261.) We, of course, share Judge Souter's view of the constitutionality of the death penalty and were pleased with his unequivocal statements concerning its validity.

D. Judge Souter enthusiastically supports the jury trial system

Judge Souter is also an enthusiastic supporter of the constitutioal guarantee of jury trial, an issue explored by senator Heflin.

> Senator HEFLIN. Would you give us your general feeling on the right of trial by jury? It is under attack today in a lot of different ways. What is your feeling about jury trial?
>
> Judge SOUTER. Well, my feelings are very strong on their value. I think I said earlier, when I was referring to some of the experiences that I had had as a trial judge, one of the best of those experiences was simply the continual exposure to jurors. I watched what they did in hundreds of cases. I talked with them after the cases were over. I left virtually every trial with an enormous respect for the jurors and the jury system.
>
> If there are two kinds of cases that I would emphasize that I found the jurors just indispensable in and dependable in, it was in criminal cases and in civil damage actions * * *.
>
> Let me just say a word about my feeling about the soundness of the jury system in criminal cases. I have heard lawyers, from time to time, wonder cynically whether, in fact, in front of a jury a defendant really does enjoy the presumption of innocence when that defendant does not take the stand and testify?
>
> One of the happy conclusion sthat I can report after presiding over hundreds of jury trials in criminal cases is that the answer to that question is, yes, juries do take that right seriously and they are, in my judgment, scrupulous and capable in following instructions. (Tr., 9/17/90, at 140–41.)

The right to trial by jury, especially in criminal matters, is a right deserving of the most vigilant protection. There is every reason to believe from Judge Souter's testimony that he will provide this right the protection it deserves.

PART EIGHT: JUDGE SOUTER UNDERSTANDS THE VALUES PROTECTED BY THE RELIGION CLAUSES OF THE CONSTITUTION

Judge Souter showed an appropriate recognition of the complex doctrinal issues surrounding the Establishment and Free Exercise Clauses. At the same time, he showed a clear understanding both of the values underlying the religion clauses and of the deeply personal dimenson to the issues involved in such controversies.

In an exchange with Senator Leahy, Judge Souter stated with proper circumspection, that he would examine Establishment Clause claims in light of the many Supreme Court precedents that have developed over the years.

> Senator LEAHY. Suppose the original meaning of the [establishment] clause was only to prevent a State religion or Government preference among Christian sects, would you then think it was appropriate for Government to favor Christianity over Judaism or any other religion?
>
> Judge SOUTER. Well, I think any such conclusion as that would make the claim of precedent an extremely crucial one. * * * [L]et's assume that we found that the Establishment Clause had a very narrow intended meaning. Do we ignore, essentially, the development of the law for the last 40——
>
> Senator LEAHY. That's right.
>
> Judge SOUTER [continuing]. Or the last 200 years? The answer is no, we don't deal with constitutional problems that way. (Tr., 9/17/90, at 106–07.)

In an exchange with Senator Specter, Judge Souter demonstrated his familiarity with *Lemon* v. *Kurtzman* and his understanding of both the value and the shortcomings of the so called *Lemon* test. He appropriately, however, declined to predict what conclusions he as a Justice might reach on the subject:

> Senator Specter. The Establishment Clause * * * was defined by Justice Black in *Everson,* "In the words of Jefferson, * * * the clause against establishment of religion by law, was intended to erect a wall of separation between Church and State."
>
> * * * There is a sharp distinction which Chief Justice Rehnquist makes in *Wallace* v. *Jaffree* where he says, referring to the separation between Church and State, the wall of separation, Chief Justice Rehnquist says, "it should be frankly, and explicitly abandoned."
>
> Judge SOUTER. The difficulty, I think, that is focused by the Court today comes to the fore because of the dificulty in applying * * * the *Lemon* v. *Kurtzman* test. But for that difficulty, there is some question in my mind as to whether there would be the present ferment to rethink the very conceptual foundation of the Establishment Clause, which, as you indicated a moment ago, Chief Justice Rehnquist has been doing in some of his opinions.
>
> I think, like a lot of people approaching the Establishment Clause, I am loath to talk about scrapping *Lemon* v. *Kurtzman,* without knowing what comes next. * * *
>
> I would receive evidence on the issue respectfully, if there were reason to present it before me. * * * (Tr., 9/14/90, at 42–44.)

Judge Souter's role as Attorney General in *Brown* v. *Thomson* was the subject of considerable questioning by the Committee. In that case Judge Souter defended the Governor of New Hampshire's decision to fly flags on State buildings at half-mast to commemorate Good Friday. In his testimony before this Committee, Judge Souter explained that he was obligated as Attorney General to defend all actions by the Governor that were "not * * * frivolous or wholly unreasonable." (Tr., 9/14/90, at 31.) Judge Souter emphasized:

> We will not have sound constitutional adjudication in this country if we do not have a sound and vigorous adversary system. Whether or not in any given case, I might agree personally that my client's judgment was the best judgment, whether I might agree with the ultimate conclusion as to whether it was right or wrong, my personal belief is that, as a lawyer, I will do my best fairly and honestly as an advocate. (Tr., 9/14/90, at 35.)

He also acknowledged that, if he had been sitting as a judge, he would have held the Governor's actions to be in violation of the Establishment Clause. (Tr., 9/14/90, at 33.) We accept Judge Souter's explanation of his actions in that case, and find that he ably and responsibly discharged his duties as Attorney General.

Under questioning by Senator Specter, Judge Souter noted the ferment in the Court's Free Exercise jurisprudence and the seeming tension among its clause in this area, but again appropriately declined to commit himself to any conclusions as a justice:

> Senator SPECTER. [My] question goes to the Free Exercise Clause and the opinion of the [Supreme] Court in *Employment Division of Oregon* v. *Smith* [holding that the government may bar the smoking of peyote in religious ceremonies] where Justice O'Connor is very direct in strong criticism, saying that the majority opinion dramatically departs from well-settled First Amendment jurisprudence, unnecessarily resolves the question presented, and is "incompatible with our Nation's fundamental committment to individual religious liberty." She says that because * * * there is a failure to require the Government to justify any substantial burden on religiously motivated conduct by a compelling State interest and by means narrowly tailored to achieve that interest.
>
> [D]o you agree with Justice O'Connor * * *?
>
> Judge Souter. On the free exercise question, I have to be circumspect to a point because [, *interalia*,] the development of that issue is something that if I were confirmed would come before me. * * *
>
> * * * I do not come here and prior to the decision of th[e] *Smith* case or after it I have not had personal reason to want to re-examine the strict scrutiny test which has been applied in a lot of cases * * * .
>
> I do not know at this point whether we should take the *Smith* opinion, if it stands, as a total rejection of [prior caselaw concerning strict scrutiny of free exercise claims]. Tr., 9/14/90, at 42–43, 47–48.)

In sum, Judge Souter's views on the freedom of religion are wholly within the mainstream of judicial thought in the area. He retains a strong respect for Supreme Court precedents, but is aware that in this area of law more than most these precedents may be in tension with each other, suggesting a particular need for clarification.

PART NINE: JUDGE SOUTER HAS AN INFORMED AND SENSITIVE APPROACH TO ISSUES OF DISCRIMINATION

Judge Souter stated forcefally and eloquently to the Committee his view that the Constitution's promise of equal rights must be made a reality for all Americans. Under close questioning by several members of the Committee, Judge Souter fully endorsed the principle of equal rights for all. He evidenced a keen historical appreciation for the reality and tragedy of discrimination. During his testimony, Judge Souter impressed us with his appreciation for the concerns of groups that have suffered from discrimination, and with his determination to fight discrimination in all its forms. We were also favorably impressed that Judge Souter recognizes and respects the authority on the part of Congress to address discrimination under section 5 of the Fourteenth Amendment.

A. Judge Souter is sensitive to and knowledgeable about discrimination

Judge Souter spoke movingly about the tragedy of racism and the duty on the part of all branches of government—indeed, of all of our citizens—to eradicate it. He told how the experiences of his closest friends have made him sensitive to the pain that bigotry and prejudice inflict upon their victims. He addressed the serious problems of gender discrimination.

On a number of occasions during his testimony, Judge Souter spoke of his firm commitment to civil rights for all Americans. For example, in an exchange with Senator Kennedy, Judge Souter stated:

> I hope one thing will be clear * * * and that is that with respect to the societal problems of the United States today there is none which, in my judgment, is more tragic or more demanding of the efforts of every American in the Congress and out of the Congress than the removal of societal discrimination in matters of race and in the matters of invidious discrimination which we are unfortunately too familiar with. (Tr., 9/13/90, at 150.)

Mr. Wesley Williams who served with Judge Souter as a freshman advisor at Harvard College, and a friend of Judge Souter's for almost thirty years, told the committee that:

> Some, especially in the written media, have called me and asked me a number of questions, knowing about my friendship with Judge Souter going way, way back, and have asked me whether I have ever seen any signs of mean-spiritedness or prejudice on his part, whether toward racial minorities like me or toward women or otherwise. And the answer is, in our personal dealings, in what I

have seen from day to day on a sustained period of time, clearly and resoundingly no. (Tr., 9/19/90, at 9–10.)

B. Judge Souter recognizes that Congress and the courts have the power to fight discrimination

Judge Souter's views on the power of the Congress and the courts to address problems of persistent discrimination are consistent with his deeply-held view that discrimination at all forms must be eliminated from our society.

Judge Souter was questioned by several members of the Committee concerning his participation as Attorney General of New Hampshire in two cases implicating section 5 of the Fourteenth Amendment and civil rights. In *United States* v. *New Hampshire,* 539 F.2d 277 (1st Cir.), cert. denied, 429 U.S. 1023 (1976), then-Attorney General Souter continued the defense—commenced during Senator Warren Rudman's tenure as Attorney General—of the State's refusal to provide the Equal Employment Opportunity Commission with statistics breaking down the State's workforce by race and ethnicity. Judge Souter argued, inter alia, that Congress did not have power under the Fourteenth Amendment to require the State of New Hampshire to file reports with the Equal Employment Opportunity Commission. As Judge Souter explained to the Committee, this argument did not necessarily represent his personal views, but, instead, stemmed from his understanding of the role of attorneys, including the Attorney General, to advocate the positions of their clients where possible under the law:

> Judge SOUTER. The views that I came to grips with at that time were these: The first, of course, is that I was representing a client. The issue before me, as a lawyer in that case, was whether the client, whose policy was being set by the Executive Branch, speaking through the Governor, had a legitimate position which could in good-faith be pressed before the courts. It was my judgment at that time that the State did, in fact, have a case which could be pressed in defense of the Governor's position.
>
> * * * * *
>
> The issue that the Governor wished and the State wished to press forward was whether the power of Section 5 of the Fourteenth Amendment, whether the congressional power could in fact be used to require the assembly of racial data by a governmental entity with respect to whom there was absolutely no historical indication of any discrimination.
>
> * * * * *
>
> The issue before me, as Attorney General of New Hampshire, in carrying on with that litigation which had in fact begun before I became Attorney General, was whether in fact there was an argument that could be made to that effect. I believed that there was an argument that could be made to that effect. The courts rejected it and it is, of course, not an argument that would be made today. (Tr., 9/13/90, at 143–45.)

We do not believe that Judge Souter's representation of the State's position in this case in any way suggests a personal hostility to civil rights. Nothing in the papers filed by the State in that case demonstrates hostility to basic principles of racial justice and equality. Indeed, the State's concern was that compulsory maintenance of racial statistics would encourage rather than discourage the discriminatory treatment of individuals, and promote the adoption of rigid hiring quotas.

As an Assistant Attorney General, Judge Souter assisted the State's Attorney General in defending the New Hampshire voter literacy test in *United States* v. *New Hampshire*, Civ. No. 3191 (D.N.H. Oct. 27, 1970). In his role as an advocate for the State of New Hampshire, Judge Souter questioned the power of Congress to prohibit the use of literacy tests by States that did not use such tests to effect discrimination. As Judge Souter explained in his testimony:

> New Hampshire had a literacy test. The literacy test had never been used * * * for any discriminatory purposes whatsoever. There is some question as to what its practical effect was in those days. But it had never been used for discrimination.
>
> There was one thing that we did know very clearly about the law in those days, and that was that the use of a literacy test for a non-discriminatory purpose was constitutional under the Fourteenth Amendment. That had been litigated.
>
> So that New Hampshire's practice was, in fact, a wholly constitutional practice. The issue which the Governor requested the Attorney General to raise was: Is it within the power of Congress, under Section 5, to suspend a literacy test in a State in which there is absolutely no history or evidence of any sort, at any time, of its discriminatory use, in such a way as to be unconstitutional under the Fourteenth Amendment?
>
> That issue was not ultimately decided until about four or five months after our case began. That issue was decided in *Oregon* v. *Mitchell* [in which] the [Supreme] Court * * * decided that it was, in fact, within the power of the Congress to deal with literacy and the discrimination frequently associated with it, as a national problem, and to suspend the test without regard to any particular history of discrimination in the States.
>
> But that case had not been decided at the time that ours was brought. Therefore, the Attorney General at the time was in the position * * * of being requested by the Governor to defend a constitutional action under existing State law. I think that was within the appropriate role of an advocate, and it did not represent a personal opinion, either by the Attorney General or anyone else involved in the litigation about the ultimate scope of Congress' power under Section 5. (Tr., 9/13/90, at 151–52.)

Judge Souter was not defending in this case the discriminatory use of literacy tests. Indeed, the record is clear that the State of

New Hampshire had not implemented a literacy test for the pernicious purpose of excluding minorities from exercising their right to vote. The State expressly distinguished the application of a literacy test to New Hampshire voters from the application of a literacy test to voters in states where "undoubted unconstitutional State discrimination had in the past taken place." To emphasize its nondiscriminatory intent, the State had agreed to register illiterate voters pending the outcome of the case.

Based on his record and testimony before this Committee, we believe that Judge Souter has amply demonstrated his sensitivity to the problem of discrimination, and his readiness to protect against discrimination.

Judge Souter further stated that by virtue of the equal protection guarantee of the Constitution and remedial statutes passed by Congress, the federal courts have a responsibility to order relief where appropriate.

> I think it also goes without saying that when we consider the power of the judiciary to remedy discrimination which has been proven before the judiciary, the appropriate response is not simply to say stop doing it. The appropriate response, wherever it is possible, is to say undo it. That is a judicial obligation to make good on the Fourteenth Amendment. (Tr., 9/14/90, at 112.)

C. Judge Souter's opposition to gender discrimination is clear

We were impressed during the hearings with Judge Souter's concern for and commitment to equality for women. Judge Souter believes firmly that discrimination against women in our country is abhorrent, and that laws that discriminate on the basis of gender should be subject to searching judicial review, as indicated by his categorical response to questions on gender discriminatory statutes:

> Senator KENNEDY. My question is, do you not think that statutes that discriminate on the basis of sex should receive very close examination?
>
> Judge SOUTER. I do not think there is any question about it. (Tr., 9/13/90, at 158.)

In addition, we note and appreciate that Judge Souter, at several points in the hearings, spoke movingly from personal experience about his understanding of the problems women face in our society and the choices they must make. For example, in an exchange with Senator Metzenbaum, Judge Souter explained that he had had experience with the difficult choice faced by women who must decide whether to have an abortion:

> Senator METZENBAUM. My real question to you is not how you would rule on *Roe* v. *Wade* or any other particular case coming before the Court. But what does a woman face, when she has an unwanted pregnancy, a pregnancy that my be the result of rape or incest or failed contraceptives or ignorance of basic health information, and I would just like to get your own view and your own thoughts of that woman's position under those circumstances.

> Judge SOUTER. Senator, your question comes as a surprise to me. I was not expecting that kind of question, and you have made me think[] of something that I have not thought of for 24 years.
>
> When I was in law school, I was on the board of freshmen advisors at Harvard College. I was a proctor in a dormitory at Harvard College. One afternoon, one of the freshmen who was assigned to me, I was his advisor, came to me and he was in pretty rough emotional shape and we shut the door and sat down, and he told me that his girlfriend was pregnant and he said she is about to try to have a self-abortion and she does not know how to do it. He said she is afraid to tell her parents what has happened and she is afraid to go to the health services, and he said will you talk to her, and I did.
>
> I know you will respect the privacy of the people involved, and I will not try to say what I told her. But I spent two hours in a small dormitory bedroom that afternoon, in that room because that was the most private place we could get so that no one in the next suite of rooms could hear, listening to her and trying to counsel her to approach her problem in a way different from what she was doing, and your question has brought that back to me.
>
> I think the only thing I can add to that is I know what you were trying to tell me, because I remember that afternoon. (Tr., 9/13/90, at 180–81.)

Also enlightening was the testimony of Ms. Deborah Copper, a New Hampshire attorney. In 1976, on his first day as Attorney General, Judge Souter interviewed Ms. Cooper for a position as an attorney in his office. He hired Ms. Cooper, making her then the only woman on an all-male staff. "I do not know whether David Souter had his own affirmative action plan," Ms. Cooper recalled for the Committee. "I do know that David Souter treated the women in his office with professional respect and that he gave me and other women equal opportunities." Indeed, Ms. Cooper later went on to become Deputy Attorney General, a position second only to that of Attorney General. "I am confident," she stated, "that that opportunity arose largely because of the opportunities and training that I was given during David Souter's term as attorney general. * * * Judge Souter made me believe that my gender was not the reason for my appointment. I know that, to him, my sex was not a factor." (Tr., 9/18/90, at 170–71.)

Judge Souter's ability to understand the concerns of women and his willingness to address their concerns is seen best through the following exchange Ms. Cooper had with the Chairman. Chairman Biden asked Ms. Cooper about Judge Souter's view of the Fourteenth Amendment's Equal Protection Clause as it applies to gender discrimination:

> Chairman BIDEN. After having worked with him, do you have any thoughts as to where he is likely to come down on those issues?

> Ms. Cooper. I cannot predict how Judge Souter would come down on those issues, Senator. I know that he would approach them with the fundamental sense of fairness and I believe that, based on my personal experience and working with him, that he has great respect for women and for women in the profession.
>
> Chairman Biden. As a woman, do you have any, not doubts about his integrity or his capability, but do you wonder where he will come down on issues relating to sex discrimination and on reproductive rights? Does it conern you at all?
>
> Ms. Cooper. Yes, it certainly does. I do wonder. I have concerns and I have questions, but I have ultimate faith in David Souter's ability to approach those in a professional and skilled manner. He is not insensitive to the issues that affect women. (Tr., 9/18/90, at 173.)

Finally, we note that Judge Souter expressed the view that statutes that discriminate on the basis of gender must be subject to more searching scrutiny than the rational basis test applied to ordinary statutes. (Tr., 9/13/90, at 155–58.)

It was not, however, that Judge Souter simply refused to provide the Committee his views as to what the standard should be; he candidly acknowledged that, without further research and analysis, he simply did not know what standard should be applied. This is understandable. The Court itself has had difficulty articulating standards in these difficult areas.

THE NOMINATION PROCESS

VIEWS EXPRESSED IN THE COURSE OF RESPONSIBLE ADVOCACY ON BEHALF OF CLIENTS SHOULD NOT BE AUTOMATICALLY ATTRIBUTED TO NOMINEES

Judge Souter has "exercis[ed] a variety of roles that may have resulted in the views he expressed not necessarily being his own." This is an appropriate acknowledgment of a lawyer's duty to his client. No position responsibly taken as an advocate should affect the Senate's judgment concerning a nominee's fitness for the Court. As Senator Hatch explained, it would be "improper" for the Committee to evaluate Judge Souter's fitness for the Supreme Court on the basis of the positions he took as an advocate. (Tr., 9/13/90, at 166.)

Under the American system of justice, lawyers, whether in private practice or government service, serve as advocates on behalf of their clients. The goal of this system is to seek the truth by means of a forceful and cogent presentation of both sides of an issue before an impartial arbiter. In order to serve that goal, our legal system imposes two primary ethical duties uon advocates: to represent clients with unpopular positions, so that those individuals may have their viewpoints competently and persuasively expressed; and to zealously seek the lawful objectives of clients through all reasonably available means. Indeed, it is an affirmative obligation imposed upon every lawyer in our society to refrain from asserting his or her individual views about the justness of a cause. See generally ABA Model Code of Professional Responsibility, Canons 6 & 7; New Hampshire Court Rules, New Hampshire Rules of Professional Conduct, Rules 1.1-1.3, 3.1, 3.3, 6.1 and 6.2.

In his own testimony before the Committee, Judge Souter demonstrated that he had faithfully adhered to these canons. When acting as Attorney General, Judge Souter zealously advocated the positions advanced by his client, the State of New Hampshire and its Governor. Although Judge Souter frankly acknowledged that he disagreed with some of the legal positions relied on by the State or the Governor, he explained that he considered himself bound to defend all actions by the Governor that were "not * * * frivolous or wholly unreasonable." (Tr., 9/14/90, at 31.) Judge Souter emphasized:

> We will not have sound constitutional adjudication in this country if we do not have a sound and vigorous adversary system. Whether or not in any given case, I might agree personally that my client's judgment was the best judgment, whether I might agree with the ultimate conclusion as to whether it was right or wrong, my own personal belief is that, as a lawyer, I will do my best fairly and honestly as an advocate. (Tr., 9/14/90, at 35.) Judge Souter's ethical obligation as a lawyer demanded no less.

Judge Souter's views on this issue were further developed in response to a question from Senator Kennedy:

> The views that I came to grips with at that time were these: The first, of course, is that I was representing a client. The issue before me, as a lawyer in that case, was whether the client, whose policy was being set by the Executive Branch, speaking through the Governor, had a legitimate position which could in good-faith be pressed before the courts. It was my judgment at the time that the State did, in fact, have a case which could be pressed in defense of the Governor's position. * * *
>
> The issue that the Governor wished and the State wished to press forward was whether the power of Section 5 of the Fourteenth Amendment, whether the congressional power could in fact be used to require the assembly of racial data by a governmental entity with respect to whom there was absolutely no historical indication of any discrimination * * *.
>
> The issue before me, as Attorney General of New Hampshire, in carrying on with the litigation which had in fact begun before I became Attorney General, was whether in fact there was an argument that could be made to that effect. I believed that there was an argument that could be made to that effect. The courts rejected it and it is, of course, not an argument that would be made today. (Tr., 9/13/90, at 143-45.)

We would be concerned by any attempt to hold a judicial nominee accountable for any positions taken as an advocate for a client. Were it to do so, there is little question that unpopular clients or clients with unpopular causes would find themselves increasingly unable to obtain legal counsel. As Senator Hatch explained.

> If we are going to start criticizing advocates because they advocated for people who may have been wrong, we would hardly ever have an opportunity of putting a criminal lawyer on the Supreme Court, or any other bench, for that matter. Nor would we have an opportunity of putting people who actually go to bat for some pretty reprehensible people in our society and try and uphold their rights, which is time honored, one of the most important obligations of any attorney worth his or her salt. (Tr., 9/13/90, at 171–72.)

IT WOULD BE INAPPROPRIATE TO IMPOSE A "BURDEN OF PROOF" ON A SUPREME COURT NOMINEE

It is well-settled that a President's nominee for the Supreme Court comes before this Committee with a presumption of suitability for that high office. Of course, that presumption may be overcome in individual cases. The Committee may reject a nominee if it finds serious flaws in his or her character or serious deficiency in professional qualification. But the Constitution gives the President the prerogative to choose the men and women to serve on the High Court. While we in the Senate are also accorded a central role in the process by which one is elevated to the highest court, we are obliged to fulfill that role in a way that, consistent with the intention of our great charter of government, does not usurp the preeminent role of the President. Any suggestion, implicit or explicit, that this or any other nominee must meet a "burden of proof" is incompatible with this high obligation. If there be a burden of proof, it is upon those who charge that the President's nominee is unfit for the Supreme Court.

We must, therefore, respectfully disagree with the assertion that a "burden of proof" rests with a nominee to demonstrate his fitness for the Court. We believe that imposition of such a burden upon the nominee denigrates the dignity of the Supreme Court as an institution and nominees to that Court as individuals. More important, the imposition of such a burden on the President's nominee represents an unwarranted, and in our view inappropriate, attempt to redefine the roles of the President and the Senate as they are now defined in the Constitution itself.

Testifying before this Committee, former Attorney General Griffin Bell warned us of the unfortunate consequences of the Senate applying litmus tests to Presidential nominees:

> If you put the burden of proof on [a nominee], what will the next candidate do? He will come over and he will try to get a poll to find out what everyone is thinking, and maybe he will come over and make a great statement, taking solid positions on four or five big issues which have to do directly with what he is going to be called upon to decide. I do not know where that would take us. (Tr., 9/18/90, at 112.)

Confirming a Supreme Court nominee on the basis of this score on a series of litmus tests, the entire Committee agrees, is repugnant to our commitment to an independent judiciary.

In performing our advice and consent function, neither the Comittee nor the Senate as a whole should act as a "super-Court," predetermining cases by ensuring that we confirm only those who share our personal or political preferences. It is no more appropriate for the Senate to apply litmus tests in its confirmation role than it is for the President to apply such tests in deciding whom to send forward for confirmation. The Committee and the Senate must inquire carefully into the qualifications, judicial temperament, intelligence and, above all integrity of each nominee. But we must not seek commitments, either express or implied, from any nominee with respect to his or her vote or reasoning in any future case. Nor should we attempt to ensure that only persons who share our personal, political, or philosophical views will be nominated by threatening that we will not confirm a nominee who does not share our views. To do so would be to misappropriate the President's constitutional role in the selection of judges and to seriously undermine the independence of the judiciary on which our basic freedoms ultimately rest.

Thus, we concur wholeheartedly that no nominee should be held to any litmus test or required to respond to questions that might suggest how he or she would rule in any particular case.

This Committee should not and cannot require any judicial nominee to compromise his or her judicial independence by stating views on any case or legal question that may come before the nominee on the bench. Apart from the impact of such an approach on the integrity of the process and the independence of the judiciary, an insistence upon litmus tests is antithetical to the principle of law itself. As Judge Souter said in his opening statement, the solemn obligation of judges is to "use every power of our minds and our hearts and our beings to get those rulings right." (Tr., 9/13/90, at 99.) The law derives from the people, and it is manifested on the Constitution and in the statutes duly enacted by the representatives of the people; it is not a product of a judge's or this Committee's view as to what the law "should" be. The rule of law must endure if the Nation is to endure.

In sum, an attempt to place a burden of proof on this nominee, or future nominees, would not only be misguided, but would seriously compromise the integrity of the confirmation process and thereby the integrity of the Court. We repeat, the President's nominee for a position on the Supreme Court comes to this Committee with a presumption of qualification to shoulder the grave responsibility that service on the Supreme Court entails. This presumption, grounded in the Constitution, will preserve the dignity of the confirmation process and the essential roles of the political branches in the confirmation process as they are contemplated by the Constitution.

JUDGE SOUTER WAS APPROPRIATELY FORTHCOMING IN HIS TESTIMONY BEFORE THE COMMITTEE

A nominee coming before this Committee does have an affirmative obligation to be forthcoming and responsive to the Committee's lines of inquiry. The nominee, however, must strike an appropriate balance between those questions he or she may appropriately answer and those that call for improper comments on cases that may come before the Court. We agrree with Senator DeConcini:

> I just want to say to you, Judge Souter, that I am very impressed with your presentation over the last four days and also the openness that you have come forward with, different than other nominees that we have had. * * * Though I think you have adequately and properly protected your need to withhold answers in some areas, because of decisions before the Court * * * you took advice from a number of us * * * that I hoped you were forthcoming. Indeed, you have been, in this Senator's judgment * * *. (Tr., 9/17/90, at 71–72.)

We believe that Judge Souter struck an appropriate balance in his testimony; that his testimony and the record before the Committee enabled us fully to discharge our constitutional responsibility of advice and consent; and that a requirement of greater specificity would gravely compromise the independence of the judiciary and the separation of powers. Such independence is explicitly mandated by the Constitution, by federal statute, and by the canons of judicial ethics. See U.S. Const. art. III, § 1 ("The judicial Power of the United States, shall be invested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges * * * shall hold their Offices during good Behaviour * * *."); 28 U.S.C. § 455(a) ("Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned"); Model Code of Judicial Conduct, Canon 3(A)(6) ("A judge should perform the duties of his office impartially * * *. A judge should abstain from public comment about a pending or impending proceeding in any court * * *.") And without this independence, which is ensured by refusal to probe into the nominee's views on specific matters, there cannot be law as we understand it.

Throughout the history of our Republic, Presidents, Senators, and judicial nominees have almost uniformly accepted the importance of maintaining both the appearance and the reality of judicial independence throughout the nomination and confirmation process. President Lincoln's observation is oft repeated: "We cannot ask a man what he will do, and if we should, and he should answer us, we should despise him for it." The late development of testimony by judicial nominees at all, and the strong resistance to that development by eminent jurists such as Justice Frankfurter, reflect this strong bipartisan respect for judicial independence and integrity. The particular attention recently given by the Committee to whether nominees have been asked to give or have given commitments to the Administration underscores the imperative for such limits upon the Committee, no less than upon the President.

The relatively recent practice of testimony by nominees has required a particular measure of caution by both nominees and the Committee. Even the appearance that nominees were prepared to offer commitments to Senators to secure their votes would degrade the Supreme Court and seriously jeopardize public confidence in the administration of justice. Should such commitments actually be given, public confidence in the Senate, the Court, and the rule of law would be justifiably forfeited. Former Chief Justice Warren Burger summarized the point in characteristically pity terms. "To expect a nominee to make commitments, or even to engage in substantive discussion of a case yet unseen, borders on the preposterous," the Chief Justice wrote. "To call on a nominee for advance views as to questions that may come before the Court is really not unlike asking a potential juror how he or she will decide a particular case that the jury has not yet heard." Burger. "How Far Should the Questions Go?," *Parade Magazine,* Sept. 16, 1990, at 10, 14. Justice John Paul Stevens recently made the same point; "You really wouldn't want a judge who would say in advance how he or she would vote on particular issues. That's not part of the independent judiciary that's such an important part of our tradition and our history." *N.Y. Times,* Aug. 8, 1990, at A14, col. 1.

These exceptionally serious considerations have led some observers to recommend that absent issues of personal conduct Supreme Court nominees should no longer appear as witnesses before the Committee. Without endorsing this particular approach, we share the concerns prompting its suggestion. Every recent nominee to come before the Committee has carefully reserved questions that would require him or her to opine on issues likely to come before the Court, usually—and rightly—with the support of the Committee and the Senate.

Judge Souter's testimony has been widely praised from all parts of the political spectrum for its exemplary candor and propriety. He carefully struck the proper balance between the Senate's responsibility to ascertain his fitness and the absolute necessity for any nominee, but particularly a sitting federal judge, to scrupulously observe his ethical and constitutional responsibilites. He testified before the Committee for three days, responding to repeated questions from all its members. His answers were direct and thoughtful, but properly stopped short of expressing his specific views on matters likely to come before the Court. In addition to Judge Souter's testimony, the Committee received and reviewed thousands of pages of documents submitted by Judge Souter, as well as his over 200 judicial opinions. This combination of sources provided a comprehensive basis for the Committee's overwhelmingly favorable evaluation of the nominee.

Judge Souter's appropriate reluctance to state in a nonjudicial forum his current views of subjects bearing on present or future legal controversies was admirable, and fully consistent with the canons of judicial ethics. Judge Souter explained his position in compelling terms:

> [I]f the judicial process is nothing else, it is a process in which in every court and on every issue that may come before a judge the people who come before him can have a

> fair hearing. A fair hearing means something substantially more than simply judicial courtesy to sit back and let a person say whatever is in that person's mind. A fair hearing requires a willingness of the court not only to listen, but genuinely to examine the position which the court is inclined at that point to take.
>
> Anything which substantially could inhibit the court's capacity to listen truly and to listen with as open a mind as it is humanly possible to have should be off-limits to a judge. * * *
>
> Is there anyone who has not, at some point, made up his mind on some subject and then later found reason to change or modify it? No one has failed to have that experience.
>
> No one has also failed to know that it is much easier to modify an opinion if one has not already stated it convincingly to someone else.
>
> With that in mind, can you imagine the pressure that would be on a judge who had stated an opinion, or seemed to have given a commitment in these circumstances to the Senate of the United States, and for all particular purposes, to the American people?
>
> You understand the compromise that would place upon the judicial capacity and that is my reason for having to draw the line. (Tr., 9/14/90, at 140–41.)

Judge Souter's deep-seated respect for the rules of judicial conduct and his concern for preserving judicial independence are in the best tradition of the Court and its nominees. His "willingness to listen" was never compromised by inappropriate responses or commitments.

CONCLUSION

We believe that Judge Souter is acutely aware of the awesome task which faces him on the Supreme Court once confirmed. Judge Souter testified that he is prepared "to undertake the greatest responsibility that any judge in our republic can undertake: the responsibility to join with eight other people, to make the promises of the Constitution a reality for our time, and to preserve that Constitution for the generations that will follow us after we are gone from here." We believe that Judge Souter possesses the competency, dedication, courage, integrity, and fairness to serve as a Justice of the Supreme Court of the United States.

ADDITIONAL VIEWS OF SENATOR HATCH

Judge Souter's excellent educational and legal background and his demonstrated knowledge of the law at the hearing all attest to his competence and ability. I believe he will join the Supreme Court with an independent mind, willing to consider different points of view on the cases which will come before him.

I also believe that he will seek to interpret and apply the law according to its original meaning. I do not believe that he will impose his own policy preferences on the American people in the guise of judging. The role of the judicial branch is to enforce the provisions of the Constitution and the laws we enact in Congress as their meaning was originally intended by their framers. That meaning must then be applied to the facts and circumstances before the judge—facts and circumstances perhaps never contemplated by the framers of the legal provision being applied. But the meaning—the underlying principle of the provision—does not change.

In my view, Judge Souter's judicial philosophy is best expressed in his dissenting opinion in the 1986 New Hampshire Supreme Court case of In re Estate of Dionne and his 1990 remarks to a Massachusetts law journal. In the Dionne case, he wrote "that 'the language of the [state] constitution is to be understood in the sense in which it was used at the time of its adoption . . .' The Court's interpretive task is therefore to determine the meaning of the [Constitutional provision] as it was understood when the framers proposed it and the people ratified it as part of the original constitutional text that took effect in June of 1784." In the May 28, 1990, Massachusetts Lawyers Weekly, Judge Souter was quoted as saying: "On constitutional matters, I am of the interpretist school. We're not looking for the original application, we're looking for meaning here. That's a very different thing."

Judge Souter never departed from this view in his testimony.

I note that I don't know whether I will always agree with Judge Souter's conclusion about the original meaning of a particular statute or constitutional provision or with his application of the provision in a given case.

I have read that some people are drawing some rather firm conclusions as to how Judge Souter might have ruled or will rule in the future on some kinds of cases—whether religious liberty cases or cases involving Congressionally mandated racial preferences. The record is clear, however, that Judge Souter did not commit as to how he would rule in those areas or almost any other area. And where he may have been more forthcoming, he is entitled to change his mind after reading the briefs and hearing oral arguments, as he has done in his judicial career thus far.

I mention this to record my view that if, in a case, Judge Souter's opinion seems to be a variance with how one of us anticipated he would rule, no one should claim he misled us. Moreover, I would hope no one would then claim we ought to probe the next nominee even further than the committee probed Judge Souter. While I have often said a senator has the right to ask a nominee any questions he wishes, a nominee is not obligated to answer all questions. I believe in some circumstances he was pressed too far and said more than a nominee should have to say at a confirmation hearing. While some may claim that so long as the nominee is not asked how he will rule in a specific case, he should answer all questions. But asking a nominee whether he endorses a very specific legal or constitutional principle, where respectable arguments can be made both for and against that principle, can in many instances be tantamount to asking how he would rule in particular cases. It clearly asks a nominee, in effect, to prejudge many specific issues. Some questions were even case-specific. As one random example, the nominee was asked whether he believed *Roe* v. *Wade* was settled law. He declined to answer. There is no practical difference between asking that question and asking how he will rule in a specific case, when the issue addressed in *Roe* so clearly remains an issue which can come before the Supreme Court. Judges should feel free to rule as they see fit on the bench and not as others anticipated they would rule.

The trend begun in this committee in the mid-1950s of probing the nominee's views on controversial issues seems to have accelerated in recent years. If the trend continues, that is something I will have to bear in mind if I am here when a member of the other party sends us a Supreme Court nominee.

Finally, I want to address this issue of litmus tests that some groups are seeking to have the Senate impose on nominees, for example, on the issue of abortion.

Some urge us to reject Judge Souter because he did not commit himself to uphold *Roe* v. *Wade*. But what would happen if different senators impose litmus tests on a variety of issues—could any nominee ever be confirmed?

Some people would make a very strong case that religious liberty issues, discrimination issues, federalism issues and other issues are so crucial that we must demand to know in advance how a nominee will rule.

Ben Wattenberg, a Democrat who is a senior fellow at the American Enterprise Institute, says that quotas should be the litmus test. He criticized a 5-4 decision from June permitting racial set-asides in the FCC's award of television and radio licenses. Suppose 20 senators apply that litmus test, and 15 other senators apply a church/state litmus test seeking to reverse the school prayer decisions, and 15 other Senators impose a litmus test on reversing the *Miranda* decision and *Mapp* v. *Ohio* imposing the exclusionary rule on the states.

How can any nominee be confirmed if we viewed our role this way?

A President may one day send us a nominee supported by proabortion groups. How would they feel if other senators and I took up Ben Wattenberg's cue on imposing a limus test on reverse discrimination, another group imposed a litmus test on overturning *Miranda* and the exclusionary rule, and a third group of prolife senators, totalling 51 senators, imposed a litmus test on reversing *Roe* v. *Wade*?

MINORITY VIEWS OF SENATOR EDWARD M. KENNEDY IN OPPOSITION TO THE CONFIRMATION OF DAVID H. SOUTER TO BE AN ASSOCIATE JUSTICE OF THE SUPREME COURT

I oppose the confirmation of Judge David H. Souter to the Supreme Court.

The Constitution itself is silent on the standard the Senate should apply in considering a Supreme Court nomination. The role of the Senate in the confirmation of judicial nominees selected by the President was a last-minute compromise reached by the Framers at the Constitutional Convention in 1787. Those who drafted the Constitution had originally proposed that the Senate alone should appoint federal judges. The final compromise, which assigns shared responsibility to the President and the Senate, was adopted as one of the key checks and balances to assure that neither the President nor the Senate would have excessive influence over the Supreme Court and other federal courts.

The genius of the Constitution and Bill of Rights is apparent in the establishment of an independent federal judiciary, sworn to protect the fundamental rights and liberties of individuals against the excesses of government and majority rule. The Supreme Court has the last word on the meaning of the Constitution, and its decisions have a profound impact on all of our lives.

In the past half century, the Supreme Court has played a central role in the effort to make America a better and fairer land. The Court outlawed school segregation in the 1950's, removed barriers to the right to vote in the 1960's, and established a far-reaching right to privacy, including the right to abortion in the 1970's. In other ways as well, the Supreme Court strengthened the basic rights of minorities and took steps to end the second-class status of women in our society. But in the decade of the 1980's, as a result of a strategy of ideological appointments in the Reagan years, the Court has seemed to pause in carrying out this important role, and in many cases has actually turned back the clock. On many of these issues, the current Court seems to be divided 4–4, so that the Senate's decision on this nomination is likely to tip the balance in one direction or the other.

In considering a Supreme Court nomination, the Senate must make two inquiries. The first is the threshold issue: Does the nominee have the intelligence, integrity, and temperament to meet the responsibilities of a Supreme Court Justice?

But that is only the beginning, not the end of the inquiry. The Senate also must determine whether the nominee possesses a clear commitment to the fundamental values at the core of our constitutional democracy.

In this second inquiry, the burden of proof rests with the nominee. Our constitutional freedoms are the historic legacy of every

American. They are too important, and the past sacrifices made to protect those freedoms have been too great, to be entrusted to judges who lack this clear commitment. If a Senator is left with substantial doubts about a nominee's dedication to these core values, our own constiutional responsibility requires us to oppose the nomination.

This not to suggest any single-issue litmus test. Nominees should be judged on their overall approach to the constitution. I have frequently supported nominees whose views on particular constitutional issues are very different from my own. But the Senate should not confirm a Supreme Court nomination unless we are persuaded that the nominee is committed to upholding the essential values at the heart of our constitutional tradition.

Recent developments at the Supreme Court have increased the importance of this inquiry by the Senate. Over the past few years, the Court has retreated from its historic role in protecting civil rights and civil liberties. In case after case, the Court has also adopted narrow and restrictive interpretations of important civil rights laws enacted by Congress. The Senate is entitled to ensure that nominees to the nation's highest court share Congress's view that these laws must be interpeted generously, to eliminate discrimination in all its forms.

Judge Souter has a distinguished intellectual background. He has spent the great majority of his legal career in public service. But aspects of his record on the bench and while serving in the New Hampshire Attorney General's Office have raised troubling questions about the depth of his commitment to the indispensable role of the Supreme Court in protecting individual rights and liberties under the Constitution.

Far from dispelling these concerns, Judge Souter's testimony before this committee reinforced them. In particular, my concerns center on the fundamental constitutional issues of civil rights, the right to privacy, and the power of Congress and the courts to protect these basic rights.

RACE DISCRIMINATION—THE EEOC CASE

Judge Souter's record and testimony on issues relating to civil rights is particularly troubling. As Attorney General of New Hampshire, Judge Souter defended Governor Meldrim Thomson's decision to refuse to provide data on the racial composition of the State government workforce required by Equal Employment Opportunity Commission regulations pursuant to Title VII of the Civil Rights Act of 1964, which is designed to bar race discrimination in the workplace, and guarantee equal opportunity in employment.

Since 1973, the Equal Employment Opportunity Commission's regulations have required state and local governments, and private firms with more than 100 employees, to file annual reports listing the racial composition of their workforce. These statistics are useful to the Commission in a number of circumstances, particularly in investigating claims that an employer has practiced discrimination in the hiring, promotion, or firing of workers.

Unlike the other 49 states, New Hampshire resisted the regulation and refused to supply such data for 1973, 1974 and 1975. When the United States sued to enforce the requirement, Judge Souter unsuccessfully defended this refusal as New Hampshire Attorney General. When the U.S. Court of Appeals for the First Circuit unanimously rejected the State's position, Attorney General Souter tried to take the case to the Supreme Court, which refused even to hear it.

Attorney General Souter took the position that it was unconstitutional for Congress to require employers to compile and report such statistics. No other litigant advanced such a specious argument. His petition to the Supreme Court even made the extraordinary argument that the EEOC requirement violated a worker's constitutional right to privacy for employers to report the overall racial composition of their workforce.

The lawyer who assisted Souter in the case, Edward Haffer, was quoted in the press recently as stating that Judge Souter was "supportive of and involved in the effort" to challenge the regulation. (Legal Times of Washington, August 27, 1990, at p. 10.) And Governor Thomson also was quoted as saying that Souter did not discourage him from pursuing the case to that Supreme Court. (The Washington Post, August 1, 1990, at p. A4.)

In the committee hearing, when I asked Judge Souter about his role in the case, he said that at the time he had no "comprehensive personal view" about whether the scope of Section 5 of the Fourteenth Amendment was broad enough to allow Congress to require the data.

Judge Souter repeatedly defended the appropriateness of his actions as Attorney General in challenging the EEOC regulation. It was only after repeated questioning that Judge Souter grudgingly admitted that the courts had been correct in rejecting his arguments. His unenthusiastic after-the-fact endorsement of the court's decision does not dispel the doubts raised by Judge Souter's outrageous arguments.

If Attorney General Souter had believed that Governor Thomson's refusal was not lawful, he could clearly have advised the Governor to abandon the appeal in the First Circuit and provide the required federal reports. And after his unanimous defeat in the First Circuit, he could have advised the Governor that the State's case should not be pursued in the Supreme Court.

The position advanced by Attorney General Souter, had it prevailed, would have prevented the federal government from taking even the first setp in eliminating race discrimination in employment in state governments. It would have prevented the federal government from collecting the information needed to determine the existence of unlawful discriminaton in state workforces. Even Kemp, the current chair of the Equal Employment Opportunity Commission, has said that without the data which Judge Souter refused to turn over, the Commission "would be in the dark when investigating cases." (The Washington Post, August 1, 1990, at p. A4.)

Discrimination is a national problem, and Congress adopted a national solution. Attorney General Souter's participation and persistence in this case is troubling, because it suggests an extremely narrow view of the power of Congress to end race discrimination in our society.

VOTING RIGHTS—THE LITERACY CASE

In landmark legislation, the Voting Rights Act of 1965, Congress banned the use of literacy tests in states where the tests had been used for discrimination.

Extending the Act in 1970, Congress went further and banned the use of literacy tests in voting nationwide, without requiring any showing that the tests were used for discrimination in any particular state. In doing so, Congress determined that literacy tests were inherently discriminatory, and that they unfairly infringed on the right to vote.

New Hampshire had a literacy test, and in 1970, it refused to comply with the federal law. So the United States brought suit to prohibit New Hampshire from enforcing its state test for the 1970 elections.

In opposing the suit, Judge Souter, who represented the State in court, argued all the way to the Supreme Court that Congress did not have the constitutional authority to ban literacy tests, in the absence of evidence that the tests had been used in a discriminatory fashion. A three-judge federal court rejected that argument, and struck down New Hampshire's literacy test. In *Oregon* v. *Mitchell*, the Supreme Court unanimously ruled that the ban on literacy tests was a constitutional use of Congressional power.

As an Assistant Attorney General, Judge Souter participated extensively in the litigation challenging New Hampshire's continued use of a literacy test. What I find most disturbing about his position on this issue was his conclusion that if people cannot read, they cannot cast meaningful ballots.

In his brief, Judge Souter said that if people who could not read were permitted to cast ballots, it would dilute the votes of literate citizens. He went on to say:

> To this harm must be added the impossibility of providing any means whereby illiterate voters could intelligently vote upon the constitutional proposals, which are presented on the ballot in narrative form; the result of allowing illiterates to make a choice in such matters is tantamount to authorizing them to vote at random, utterly without comprehension.

Mr. Souter either chose to ignore, or was unaware, of ways in which voters who cannot read can be assisted in casting ballots. In fact, at the time he filed his brief, people who could not read had been voting for years in other states, and blind voters were guaranteed assistance at the polls in New Hampshire. His insistence that literacy tests could be used to exclude such voters evidenced a willingness to discriminate against those who have been less formally educated, but who can still make intelligent, well-informed decisions about candidates and issues in elections.

As Father Theodore Hesburgh, Chairman of the Civil Rights Commission, noted in a letter to President Nixon when Congress was considering the Voting Rights Act of 1970:

> The lives and fortunes of illiterates are no less affected by the actions of local, state, and federal governments than those of their more fortunate brethren. Today, with

> television so widely available, it is possible for one with little formal education to be a well-informed and intelligent member of the electorate.

In fact, when the federal district court rejected Judge Souter's arguments and issued an order to suspend the literacy test, New Hampshire did establish procedures so that citizens who could not read were still able to vote.

An official memorandum from the State Attorney General's office to voting supervisors, implementing the district court's order, provided in part:

> 2. At the request of any illiterate [voter] to the moderator, he shall be assisted in making a written ballot by an election officer or officers detailed for that purpose by the moderator. Such request need not be accompanied by any statement under oath.
>
> 3. Wherever voting machines are used, an election official for that purpose by the moderator shall accompany every illiterate into the polling booth, shall assist him in casting his ballot, and shall make a true and accurate record of the ballot cast by him.

In this case, as in the case involving the EEOC, Judge Souter took the position that Congress did not have the power to deal with a serious national problem. Also, as in the EEOC case, the federal courts unanimously rejected his view.

I asked Judge Souter about the literacy case during his confirmation hearings. Defending his actions, he characterized his view that the votes of people who can't read would dilute the votes of people who can read as simply "a mathematical statement . . . essentially a kind of statement of math." The manner with which he dismissed the right of the poor and uneducated people of his state to vote is all the more troubling because his response was one of the rare spontaneous moments of the hearing.

Affirmative Action—or Affirmative Discrimination?

Prior to the committee hearing, news reports of a 1976 commencement address at Daniel Webster College by Judge Souter when he was Attorney General had received widespread media attention. According to contemporaneous reports of the address in several newspapers, Attorney General Souter had described affirmative action programs as "affirmative discrimination."

When questioned about the remark at his confirmation hearing, Judge Souter replied, "I hope that was not the exact quote because I don't believe that." Judge Souter went on to acknowledge that he had seen the news reports on his speech at the time he gave it, but did not indicate that he had sought a correction of the statement attributed to him. During his testimony, Judge Souter never denied making the statement. Instead, he attempted to defend his quote by arguing that he had been referring to affirmative action programs which were not linked to remedial purposes, but were merely distributing benefits for the sake of reflecting some formula of racial distribution.

However, the only federal guidelines in place at the time he made the address were regulations which encouraged employers to conduct a self-analysis with respect to their hiring practices, and to adopt, if warranted, programs designed to remedy any discriminatory practices the employers has discovered. Judge Souter's widely reported characterization of such efforts as affirmative discrimination suggests that he will have difficulty supporting government efforts to remedy discrimination.

In his testimony at the hearing, Judge Souter stated that it was appropriate for courts not just to stop unlawful discrimination, but to "undo" it. He also stated, however, that "the remedy must be tailored to the proof." Judge Souter did not disclose his views on voluntary affirmative action plans which are not the result of litigation or part of consent decrees. Voluntary affirmative action plans are critical tools for "undoing" past discrimination. The case-by-case vindication of civil rights has been a costly and painfully slow approach to assuring equal opportunity, and Congress is amply justified in pursuing a broader course.

SEX DISCRIMINATION—THE RIGHTS OF WOMEN TO EQUAL PROTECTION OF THE LAWS

Under the Equal Protection Clause of the Fourteenth Amendment, the Supreme Court has struck down virtually all laws which discriminate on the basis of race—the so-called "strict scrutiny" test. One the other hand, the court has used a weak standard to examine other classifications, and upheld such laws if there is any rational justification for them. For example, legislatures can write different laws for trucks and automobiles on the highways, and different laws for businesses of different sizes, as long as there is a plausible basis for not treating them the same.

Until the 1970's, the Supreme Court applied the weak standard to cases involving claims of sex discrimination, and accepted any rational basis for laws that treated men and women differently. Under this approach, women were routinely excluded from many occupations and subjected to forms of discrimination that almost all of us would regard as intolerable today.

In the 1970's, the Court began to apply a higher standard of review to classifications based on sex, and struck down laws that discriminated against women. In 1978, however, Attorney General Souter urged the Supreme Court to "define, shape, limit or even eliminate" the new standard. The case involved the New Hampshire statutory rape law. A man convicted under the statute claimed the law was unconstitutional, because it did not apply to women. The Supreme Court refused to review the case, but a few years later, in another case, the Court made clear that under its higher standard of review, statutory rape laws are valid, even if they do not apply to women.

It is disturbing that Judge Souter's brief suggested that the Supreme Court eliminate the higher standard of review in sex discrimination cases. If he were genuinely concerned about the rights of women, the obvious argument to have made was that even under a higher standard of review, statutory rape laws are valid. But he did not take that course. Instead, he asked the Court to go back to the old law, which had permitted sex discrimination to flourish.

His brief also called the higher standard "amoebic," and said it was in the "twilight zone"—disparaging and derogatory references to a constitutional requirement that has made a substantial difference in ending discrimination against women in our society.

When asked during his testimony before the committee whether legislative classifications based on sex should be accorded "heightened" or "intermediate scrutiny" under the three-tier equal protection analysis applied by the Supreme Court, Judge Souter endorsed some type of scrutiny between the weakest level, or "rational basis" test and the highest level, or "strict scrutiny" test. He stated that his reservations about the intermediate scrutiny" test as stated by the Supreme Court—that a classification based on sex must bear a substantial relationship to an important government interest—go to the "looseness" of the test, and the ability of courts "to read it back down to the lowest level of scrutiny" if so inclined.

However, it is troubling that Judge Souter did not commit himself to defining a standard for gender discrimination that is at least as exacting as the standard currently used by the Court to invalidate many gender-based laws. There is significant doubt that Judge Souter will apply a sufficiently rigorous constitutional standard to make protection against sex discimination a meaningful constitutional right for the women of America.

PRIVACY AND UNENUMERATED RIGHTS

On the issue of whether the Constitution protects a core right to privacy, Judge Souter said he believes that "the Due Process Clause of the Fourteenth Amendment does recognize and does protect an unenumerated right of privacy." He further endorsed the plain meaning of the Ninth Amendment as a source of other rights not enumerated in the Bill of Rights. Finally, Judge Souter categorically stated that "there is certainly, to begin with, a core of privacy which is identified as marital privacy, and I believe it can and should be regarded as fundamental." Procreation, he said, would rank at the "fundamental heart" of marital privacy.

From this promising beginning, however, Judge Souter retreated to a position in which he refused to reveal whether he believed there is any fundamental privacy right outside the marital relationship.

Specifically, in discussing the constitutional status of abortion, Judge Souter would go no further than to say that abortion "would rank as an interest to be asserted under liberty." He refused to suggest how that interest should be evaluated, or whether it would be enforceable against the state, "based upon a valuation that it is fundamental." He gave a vague general statement of what his methodology would be in deciding a case like *Roe* v. *Wade*. His analysis would include "the issue of how the interest is itself valued." It would include "what the countervailing interest may be and how they are to be valued". And, he said, "in a case of re-examining a prior precedent we have to . . . valu[e] that precedent in accordance with the general rules that we have."

In response to a question about whether a state could recognize a fundamental right to abortion in its own constitution in the face of a determination by the U.S. Supreme Court that such a right was not protected under the federal constitution, Souter replied affirmatively, but added "[w]hether there is any basis that could be raised * * * based on the rights of the fetus, rather than on the rights of the mother, that, of course, is a totally undecided issue." In discussing abortion Judge Souter also stated that "whether I do or do not find it moral or immoral, will play absolutely no role in any decision which I make." Under prodding about his "gut reaction" to the dilemma facing women if *Roe* is overruled, he first described it as a federalism problem, then acknowledged that there would be enforcement problems, and finally observed that "whatever the Court does, someone's lives, and indeed thousands of lives, will be affected, and that fact must be appreciated."

Judge Souter's reluctance to discuss specific constitutional issues relating to abortion and the right to privacy contrasted sharply with his willingness to discuss in great detail his views on other constitutional issues likely to come before the Supreme Court, For example, Judge Souter recognized that the case of *Employment Division of Oregon* v. *Smith* is currently subject to a motion for rehearing before the Court. Nevertheless, he said that he personally believed that the government had an obligation to remain neutral in all matters concerning the free exercise of religion. He further commented that while he understood the reasoning of the majority, he also recognized Justice O'Connor's argument that the case could have been evaluated under the strict scrutiny standard. He was also willing to speculate about the possible limiting effect that the *Smith* decision may have on prior case law.

Clearly, Judge Souter's view that the government should remain neutral in matters of religion is a matter of current constitutional debate, as he acknowledged during questioning. And it is likely that the issues in the *Smith* case will come before the Supreme Court again. Yet Judge Souter was still willing to give his definitive personal and constitutional opinion on the matter.

Similarly, Judge Souter had no reluctance to reveal his view that the death penalty is not cruel and unusual punishment. Every year, the Court considers cases raising questions on the death penalty. Every year, defendants argue that the death penalty is cruel and unusual punishment. Yet Judge Souter still felt it appropriate to state his opinion to the committee.

CONCLUSION

If Judge Souter joins the current closely divided Supreme Court, he may well solidify a 5–4 anti-civil rights, anti-privacy majority inclined to turn back the clock on the historic progress of recent decades. If so, literally millions of Americans will be denied their rights as Americans to equal opportunity and equal justice under law.

I hope I am wrong. But I fear I am right. To a large extent, in spite of the hearings we have held, the Senate is still in the dark about this nomination, and all of us are voting in the dark. The lesson of the past decade of the Senate's experience in confirming justices to the Supreme Court is that we must vote our fears, not our hopes.

The fate of millions of men and women directly affected by the Supreme Court's decisions is too important to leave to chance. If nominees do not meet the test of demonstrating a good-faith, in-depth, abiding commitment to the basic constitutional values of the kind so obviously at stake at this turning point in our history, they can—and should—be rejected by the Senate. To apply a lesser standard is to fail our own constitutional responsibility in the confirmation process. In my view, Judge Souter does not meet that test. In good conscience, I cannot support this nomination.

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